BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re NPDES Permit Renewal: Peabody Black Mesa NPDES Permit No. NN0022179: Black Mesa Mine Complex	)	NPDES Appeal No. 10-15 & 10-16

EPA REGION 9 RESPONSE TO PETITIONERS' PETITION FOR REVIEW

As directed, Region 9 of the United States Environmental Protection Agency ("Region") submits the following response to the petitions for review of the Peabody Black Mesa NPDES Permit No. NN0022179 ("Black Mesa Permit") filed by Black Mesa Water Coalition ("BMWC"), Diné C.A.R.E., To Nizhoni Ani, Center for Biological Diversity and the Sierra Club, NPDES Appeal No. 10-15 ("BMWC Petitioners") and former Hopi Tribal Chairman Ben Nuvamsa and Californians for Renewable Energy ("CRE"), NPDES Appeal No. 10-16 ("CRE Petitioners"). The Black Mesa Permit re-authorizes the Peabody Western Coal Co. ("permitee") to discharge treated wastewater from the Black Mesa Complex ("site") under the National Pollutant Discharge Elimination System ("NPDES") pursuant to the Clean Water Act ("CWA").

BMWC Petitioners argue that the Region committed reviewable error because: 1) the Region issued the Black Mesa Permit where no water quality limited segments and total maximum daily loads ("TMDLs") have been established for the Moenkopi Wash and Dinnebito Wash; 2) the Black Mesa Permit would cause or contribute to exceedances of water quality standards ("WQS"); 3) the Region did not require monitoring for every outfall on the site; 4) the Region failed to require effluent limitations for pollutants beyond suspended solids, iron, oil and grease, and pH; 5) the Region failed to address actions by the U.S. Army Corp of Engineers

("Corps"); 6) the Region failed to address actions by the U.S. Department of the Interior ("Interior"), Office of Surface Mining ("OSM"); 7) the Region failed to comply with the National Environmental Policy Act ("NEPA"); 8) the Region failed to comply with the Endangered Species Act ("ESA"); and 9) the Region failed to comply with procedural requirements regarding public hearings and the content of the administrative record.

While it is not entirely clear from the petition for review from CRE Petitioners, it appears they argue that the Region committed reviewable error because: 1) the Black Mesa and Kayenta mines are separate and unique operations and the permit should be re-named; 2) the Region should have performed a NEPA analysis; 3) the permitting process should have been conducted concurrently with any CWA section 404 permitting process conducted by the Corps for discharges of dredged or fill material on the site.

For the reasons stated below, the Environmental Appeals Board ("EAB" or "Board") should deny the petitions for review, because Petitioners have not satisfied the requirements of 40 C.F.R. 124.19 for obtaining review and the Region has complied with all procedural and substantive requirements of the CWA, NEPA and ESA.

I. Statutory and Regulatory Background

A. Clean Water Act

The CWA, 33 U.S.C. §§ 1251 *et seq.*, generally prohibits the discharge of pollutants to waters of the United States without an NPDES permit. CWA sections 301, 402; 33 U.S.C. §§ 1311, 1342. The CWA provides, generally, for two types of effluent limitations to be included in NPDES permits; technology-based effluent limitations and water quality-based effluent limitations. CWA sections 301, 303, 304(b); 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. Parts

122, 125, 131. Technology-based effluent limitations are established by EPA through effluent limitations guidelines ("ELGs") and new source performance standards ("NSPSs"). CWA sections 301, 304(b) and 306; 33 U.S.C. § 1311; 1314(b); 1316. Absent ELGs and NSPSs the permitting authority establishes technology-based effluent limitations on a best professional judgment basis. CWA section 402(a)(1)(B), 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. 125.3(c)(2). In the event that technology-based effluent limitations are not sufficiently stringent, the permit must include any additional water quality-based effluent limitations necessary to meet water quality standards established by the State(s) or Tribe(s).[1] CWA section 301(b)(1)(C); 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. 122.44(d)(1). Water quality-based effluent limitations must control all pollutants that are discharged at a level that "cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 40 C.F.R. 122.44(d)(1)(i). When a State or authorized Tribe adopts water quality standards, it first designates uses for the waterbody, such as use and value for public water supplies, propagation of fish and wildlife, recreation, and/or agricultural and industrial uses. It then establishes water quality criteria that protect those designated uses. CWA section 303(c)(2); 33 U.S.C. § 1313(c)(2). The CWA also requires states to identify those water segments where technology-based effluent limits are insufficient to achieve the applicable water quality standards, and which are therefore "water quality limited." CWA § 303 (d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). Once a state identifies a segment as water quality limited, the statute requires the state to develop TMDLs for that segment. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). A TMDL sets forth the total amount of a pollutant from point sources, nonpoint sources, and natural background that a water quality-

[1] The Navajo Nation received Treatment as a State for purposes of CWA sections 106 and 303 on March 23, 2006 and the Hopi Tribe received Treatment as a State for purposes of CWA sections 106 and 303 on April 24, 2008. A.R. at 25 (Black Mesa Fact Sheet at 3).

limited segment can tolerate without violating WQSs. 40 C.F.R. 130.2(i). TMDLs consist of waste load allocations for point sources discharging into the impaired segment and load allocations for nonpoint sources and natural background. EPA administers the NPDES program, by reviewing and issuing permits, on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands. *See* CWA section 518; 33 U.S.C. § 1377; 40 C.F.R. 123.1(h).

B. National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370e, requires federal agencies to consider, "to the fullest extent possible," the environmental impacts of their actions. *See* NEPA section 102, 42 U.S.C. § 4332. Under NEPA, a federal agency must prepare an Environmental Impact Statement ("EIS") for any action that is considered a "major federal action significantly affecting the quality of the human environment." NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C). A "major federal action" is an action "with effects that may be major and [that] are potentially subject to [f]ederal control and responsibility." 40 C.F.R. 1508.18. NEPA is implicated in a wide range of federal actions, including permitting, etc. *See, e.g., In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 662-66 (EAB 1996) (upholding EIS prepared by Region VI in the course of issuing an NPDES permit for a new surface coal mine). However, each agency action does not necessarily require the preparation of an EIS. Under NEPA, a federal agency must prepare an EIS only when the proposed action is a "major federal action significantly affecting the quality of the human environment." NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C). If it is unclear whether an action will significantly affect the quality of the human environmental agencies may prepare an environmental assessment. Over the years,

Congress has created a number of exemptions to the applicability of NEPA. Of particular relevance in this case is an express statutory exemption that appears in the CWA. CWA section 511(c)(1) states that no EPA action taken pursuant to CWA is subject to NEPA-EIS requirements except the issuance of an NPDES permit to a "new source" and federal funding of publicly owned treatment works construction.[2] 33 U.S.C. § 1371(c)(1).

C. Endangered Species Act

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, has two primary components: (1) a federal government action and interagency cooperation program, found in ESA section 7; and (2) a list of prohibited acts, found in ESA section 9. The relevant provision for this petition is ESA section 7, which requires all federal agencies to ensure, through consultation with the Secretary of the Interior (or Commerce, for marine species), that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a species' critical habitat. ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2). Section 7 responsibilities come into play only when a regulated "agency action," such as the issuance of a federal permit, is pending. ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2); 50 C.F.R. 402.01-.02; *see also* 40 C.F.R. § 122.49(c) (ESA procedures must be followed when issuing NPDES permit). Federal agencies typically begin the ESA section 7 process by determining whether a proposed action "may affect," directly or

[2] CWA section 511(c)(1) in its entirety states: "Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major [f]ederal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969."

indirectly, listed species or designated critical habitat in a particular geographical area. That area, called the "action area," includes "all areas to be affected directly or indirectly by the [f]ederal action and not merely the immediate area involved in the action." 50 C.F.R. 402.02. "Direct effects" are a project's immediate impacts on listed species or their habitats, *see Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987), while "indirect effects" are effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. 402.02. The "effects of the action" also include the effects of other actions that are "interrelated or interdependent with" the project. Federal agencies may document their "may affect" determinations in something called a "biological assessment" ("BA"). 50 C.F.R. 402.02, 402.12. If an agency decides its proposed action will have no effect on listed species or designated habitat in the action area, the section 7 process ends and the federal agency's responsibilities under the ESA have been fulfilled. 50 C.F.R. § 402.14(a).

II. Factual and Procedural Background

A. Factual Background

The Black Mesa Permit is for discharges from the Black Mesa and Kayenta mines that, together, form the Black Mesa Complex (hereinafter referred to as the "site").[3] The mining operations on the site, for the removal of coal, began in the early 1970s. A.R. at 24 (Black Mesa Fact Sheet at 2). The Black Mesa Permit authorizes the discharge of pollutants from 111 outfalls on the site. A.R. at 25 (Black Mesa Fact Sheet at 3). The site is located on approximately 64,858 acres of land leased within the boundaries of the Hopi and Navajo Indian Reservations.

[3] The site is one contiguous parcel of property that is operated by the same entity, the permitee, Peabody Western Coal Co.; however references in this response to the "Black Mesa mine" or "Kayenta mine" are to the separate "pits" where there is, or were, ongoing coal mining operations on the site.

A.R. at 24 (Black Mesa Fact Sheet at 2). The discharges from the site include wastewater discharges associated with active mine areas, coal preparation plant areas, and reclamation areas. A.R. at 25 (Black Mesa Fact Sheet at 3). There are discharges from ongoing coal mining operations on the site, in addition to discharges from areas that were previously subject to coal mining operations, thus the discharges from the site are subject to the technology-based effluent limitations at 40 C.F.R. Part 434 for the Coal Mining Point Source Category through NPDES permits. *See generally* 40 C.F.R. 434.10. The wastewater discharges from each of the several on-going activities (i.e., active mining, coal preparation and reclamation) are subject to effluent limitations in separate subcategories within 40 C.F.R. Part 434 and apply to the different outfalls permitted under the Black Mesa Permit.[4] A.R. at 26-27 (Black Mesa Fact Sheet at 4-5).

The wastewater discharged from the site consists of stormwater runoff from areas of the site where coal extraction, coal preparation, and surface reclamation activities are being conducted and the dewatering of surface impoundments.[5] A.R. at 25-27 (Black Mesa Fact Sheet at 3-5). All discharges from the site classified as "Alkaline Mine Drainage" and "Coal Preparation Plants and Coal Preparation Plant Associated Areas" are treated in surface

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[4] 71 outfalls, which meet the definition at 40 C.F.R. 434.11(c), for Subpart D - "Alkaline Mine Drainage," must meet the technology based effluent limitations at 40 C.F.R. 434.42-45; 32 outfalls, which meet the definitions at 40 C.F.R. 434.11(e), (f) and (g), for Subpart B – "Coal Preparation Plants and Coal Preparation Plant Associated Areas," must meet the technology based effluent limitations at 40 C.F.R. 434.22-25; and 8 outfalls, who meet the definition at 40 C.F.R. 434.81, for Subpart H – "Western Alkaline Coal Mining," must meet the technology based effluent limitations at 40 C.F.R. 434.82-85. A.R. at 19-22 (Black Mesa Permit at 19-22).

[5] Many of the discharges from the site are subject to the Black Mesa Permit there are precipitation related discharges from the site that are authorized under the federal Multi-Sector General Permit ("MSGP") (AZR05F121) for specific discharges of stormwater associated with industrial activity. *See* 40 C.F.R. 122.26(b)(14); *see also* 2008 EPA MSGP, 73 Fed. Reg. 56572 (September 29, 2008), *available at* http://cfpub.epa.gov/npdes/stormwater/msgp.cfm (last visited Jan.13, 2011).

impoundments (also referred to as "ponds") to remove sediment and other pollutants prior to discharge. A.R. at 25-27 (Black Mesa Fact Sheet at 3-5).[6] The Black Mesa Permit establishes numeric and non-numeric effluent limitations that apply to the discharges from the outfalls associated with "Alkaline Mine Drainage" and "Coal Preparation Plants and Coal Preparation Plant Associated Areas." A.R. at 3-4 (Black Mesa Permit at 3-4); A.R. at 26-27 (Black Mesa Fact Sheet at 4-5). For areas of the site classified as "Western Alkaline Reclamation Areas," which are reclaimed areas of the site, as well as topsoil stockpiling and brushing and grubbing areas, the Black Mesa Permit establishes non-numeric effluent limitations that are documented in a Sediment Control Plan. A.R. at 5 (Black Mesa Permit at 5); A.R. at 27-28 (Black Mesa Fact Sheet at 5-6).

Additionally, the Black Mesa Permit requires the permitee to implement a "Seep Monitoring and Management Plan." A.R. at 8-9 (Black Mesa Permit at 8-9); A.R. at 29-34 (Black Mesa Fact Sheet at 7-12). The "seeps" on the site are areas where wastewater contained in the impoundments may infiltrate through or under the impoundment and resurfaces at a location hydrologically downgradient of the impoundment. A.R. at 30 (Black Mesa Fact Sheet at 8). In general, there are not many seeps, low in flows and they may not discharge to a water of the United States. A.R. at 59 (RTC at 17). These seeps are *not* authorized discharges under the Black Mesa Permit and the terms of the Black Mesa Permit seek to eliminate those seeps. A.R. at 30 (Black Mesa Fact Sheet at 8); A.R. at 58-59 (RTC at 16-17). The Black Mesa Permit requires the permitee to identify and characterize seeps on site; to identify those seeps that may

[6] In numerous instances, the wastewater is retained in multiple impoundments prior to reaching the discharge point from the site; thus, there are approximately 230 impoundments on the site while there are only 111 authorized outfalls. A.R. at 30 (Black Mesa Fact Sheet at 8).

pose a threat to water quality, and to establish controls at those locations in order to eliminate the seeps. A.R. at 29-34 (Black Mesa Fact Sheet at 7-12); A.R. at 58-59 (RTC 16-17).

The Moenkopi Wash and Dinnebito Wash and their tributaries are the receiving waters for discharges from the site and are located within the Navajo Nation and Hopi Tribe Reservations. A.R. at 19-22 (Black Mesa Permit at 19-22); A.R. at 24-25 (Black Mesa Fact Sheet at 2-3). The Moenkopi Wash and Dinnebito Wash are ephemeral washes with short intermittent reaches that drain southwest to the Little Colorado River system. A.R. at 25 (Black Mesa Fact Sheet at 3). No surface waters receiving discharges from the site have been identified as impaired and therefore included on the CWA section 303(d) list. A.R. at 25 (Black Mesa Fact Sheet at 3). The Navajo Nation approved the Navajo Nation Surface Water Quality Standards (NNSWQS) on November 9, 1999 and amended them on July 30, 2004. A.R. at 25 (Black Mesa Fact Sheet at 3). EPA approved the Navajo Nation's water quality standards in March 2006. A.R. at 25 (Black Mesa Fact Sheet at 3). Similarly, the Hopi Tribe approved the Hopi Surface Water Quality Standards on August 29, 1997. A.R. at 25 (Black Mesa Fact Sheet at 3). EPA approved the Hopi Tribe's water quality standards on July 9, 2008. A.R. at 25 (Black Mesa Fact Sheet at 3). The Navajo and Hopi water quality standards apply to waters receiving the discharges from the site, thus the Black Mesa Permit incorporates limits and standards for the protection of receiving waters in accordance with those standards. A.R. at 10-12 (Black Mesa Permit at 10-12).

B. Procedural Background

The Region last re-issued the Black Mesa Permit (NPDES Permit No. NN0022179) for the discharge of treated wastewater from the site on December 29, 2000. A.R. at 1334-1346

(2000 Black Mesa Permit). On August 3, 2005 the permitee filed a timely application for renewal of its NPDES permit. A.R. at 23 (Black Mesa Fact Sheet at 1). The conditions of the 2000 Black Mesa Permit have been administratively continued since the permit's expiration on February 1, 2006. A.R. at 23 (Black Mesa Fact Sheet at 1); *see also* 40 C.F.R. 122.6. The Region proposed the renewal of the Black Mesa Permit on February 19, 2009. A.R. at 23 (Black Mesa Fact Sheet at 1); A.R. at 944-973 (2009 Proposed Black Mesa Permit & 2009 Black Mesa Proposed Fact Sheet). On August 5, 2009 the Region issued a final permit. A.R. at 885-930 (2009 Black Mesa Permit; 2009 Black Mesa Fact Sheet; & 2009 Black Mesa Permit Issuance Letter). On September 4, 2009, a petition seeking review was filed with the Board regarding the August 2009 permit reissuance.[7]

On December 3, 2009 the Region withdrew the August 2009 reissuance of the Black Mesa Permit in order to hold public hearings on tribal lands to ensure that interested parties were given full opportunity to meaningfully participate in the permit proceedings. A.R. 872-874 (Notice of Withdrawal of 2009 Black Mesa Permit). The Region provided a second public notice of the draft Black Mesa Permit on January 20, 2010. A.R. at 85. The Region held two public hearings on tribal lands on February 23, 2010 and February 24, 2010. A.R. at 123-124. The Region issued the final renewal for the Black Mesa Permit on September 16, 2010. A.R. at

[7] The same Petitioners, minus Sierra Club, Ben Nuvamsa, and Californians for Renewable Energy, filed the petition for review. In that petition, BMWC Petitioners raised issues similar to those BMWC Petitioners raise in their October 18, 2010 petition. After the Region withdrew the August 2009 Black Mesa Permit the Board issued an order dismissing their September 4, 2009 petition for review with prejudice. *See In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10 (EAB 2009) (Order Dismissing Petition for Review with Prejudice).

39-42 (Black Mesa Permit Issuance Letter). BMWC and CRE Petitioners both filed petitions for review on October 18, 2010.[8] *See* BMWC Petition and CRE Petition.

III. Standard of Review

Petitions for review of NPDES permits are governed by EPA regulation 40 C.F.R. 124.19. Pursuant to that regulation, the Board ordinarily will not grant a petition for review of an NPDES permit unless the petition establishes that the Region based the permit on a clearly erroneous finding of fact or conclusion of law or on an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. 124.19(a); *see In re: City of Attleboro*, NPDES Appeal No. 08-08, at 10 (EAB 2009) (Order Denying Review); *In re City of Marlborough*, NPDES Appeal No. 04-13, at 239-40 (EAB 2005) (Order Denying Petition for Review in Part and Remanding in Part); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002).

The Board has stated that it analyzes NPDES permits guided by the preamble to the NPDES permitting regulations at Part 124, which states that the Board's power to review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 472 (EAB 2004); *In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). This restraint by the Board is based, at least in part, on Agency policy

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[8] BMWC Petitioners also sought an extension of time to file a supplemental brief. *See* BMWC Petition. The Region opposed that motion. *See* Response to Petitioners' Motion for Extension of Time to File Supplemental Brief (hereinafter "Region's Response"). Before the Board ruled on the motion BMWC Petitioners filed a Supplemental Brief in Support of Petition for Review (hereinafter referred to as "Supplemental Brief") on November 1, 2010. The Board granted BMWC Petitioner's motion allowing the Supplemental Brief and granted the permitee permission to respond to the BMWC and CRE Petitions based on the permitees' November 2, 2010 motion. *See In re Peabody Western Coal Co.*, NPDES Appeal Nos. 10-15 & 10-16 (EAB 2010) (Order Accepting Supplemental Brief for Filing and Granting Permitee Permission to Respond to Petitions).

that favors resolution of issues related to the promulgation of NPDES permits at the regional level. *See* 45 Fed. Reg. at 33,412; *see also Teck Cominco*, 11 E.A.D. at 472. The burden is on the petitioner to demonstrate, pursuant to 40 C.F.R. 124.19, that review by the Board is warranted. *See In re: City of Attleboro*, NPDES Appeal No. 08-08, at 10; *In re Amerada Hess Corp.*, 12 E.A.D. 1, 8 (EAB 2005).

In order to meet their burden, petitioners must demonstrate that any issues being raised before the Board were preserved for review. *See* 40 C.F.R. 124.19 ("[t]he petition shall include a statement of the reasons supporting review, including a demonstration that any issues being raised were raised during the public comment period"); *see also In re: City of Attleboro*, NPDES Appeal No. 08-08, at 10; *In re City of Moscow*, 10 E.A.D. at 141. The petitioner must state its objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion or otherwise warrants review. *See In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Haw Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998). As the Board has repeatedly stated, and of particular relevance in this case, to obtain review, "petitioners must include specific information in support of their allegation. It is not sufficient simply to repeat objections made during the comment period; instead, a petitioner 'must demonstrate why the [permit issuer's] response to those objections (the [permit issuer's] basis for its decision) is clearly erroneous or otherwise warrants review." *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (EAB 2001) (quoting *In re LCP Chems.*, 4 E.A.D. 661, 664 (EAB 1993)); *see also In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. In other words, petitioners may not simply repeat previous comments made, but must "substantively confront" the Region's subsequent explanations in the final permit to the

comments that were raised by the public. *In re: City of Attleboro*, NPDES Appeal No. 08-08, at 10.

The Board's interpretation and application of EPA's procedural pleading requirements for administrative review, notably where the Board has refused to grant review to petitioners who have merely reiterated or attached comments they had previously been submitted regarding the draft permit, without engaging EPA's responses to those comments, have been upheld by the federal courts as valid. *See e.g., City of Pittsfield v. U.S. EPA*, 614 F.3d 7, 11-12 (1st Cir. 2010) ("the city made no effort in its petition to the Board to engage the EPA's initial response to its draft comments"); *Michigan Dept. of Env't Quality v. U.S. EPA*, 318 F.3d 705, 707-08 (6th Cir. 2006) ("[i]nstead of explaining to the Board why the Region's detailed responses to its comments were clearly erroneous, [the Petitioner] simply repackaged its comments"). Finally, a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *In re: City of Attleboro*, NPDES Appeal No. 08-08, at 11; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. at 667.

IV. Argument

The Region responds to the petitions from BMWC and CRE separately below; however the Region references its earlier responses when addressing issues raised by both petitions. For several issues below, neither of the Petitioners met the standard of review discussed above due to a lack of any attempt to address the Region's responses to their comments during the draft permitting process or to explain why, in their view, the Region's response was clearly erroneous or otherwise warrants review.

A. BMWC Petition

The issues raised by the BMWC Petition fall, generally, into four categories: NEPA; CWA; ESA; and procedural issues. However, as an initial matter, the Region must address BMWC Petitioners' attempt to reserve the right to, again, supplement their petition before the Board.

1. BMWC Petitioners may not Supplement their Petition

BMWC Petitioners seek to reserve the right to supplement their petition to raise additional issues. *See* BMWC Petition at 6; BMWC Supplemental Brief at 5. The Region opposes BMWC Petitioners from raising additional issues not included in their October 18, 2010 BMWC Petition or their November 1, 2010 BMWC Supplemental Brief as that would be contrary to 40 C.F.R. 124.19 and no "special circumstances" exist in this case.[9]

Pursuant to EPA regulations, a petitioner who seeks review of any condition of an NPDES permit must file a petition with the Board within 30 days after a final permit decision. 40 C.F.R. 124.19(a). *See In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4 (EAB 2007) (Order Denying Review). The "failure to ensure that the Board receives a petition for review by the filing deadline will generally lead to dismissal of the petition on timeliness grounds." *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4; *see also In re AES Puerto Rico LP*. 8 E.A.D. 324, 329 (EAB 1999); *In re Knauf fiber Glass GmbH*, 9 E.A.D. 1, 5 (EAB 2000); *In re*

[9] The Region briefed this same issue in its Response to Petitioners' Motion for Extension of Time to File Supplemental Brief filed on October 27, 2010 at 5-7. The Board's November 4, 2010 Order Accepting Supplemental Brief for Filing and Granting Permitee Permission to Response to Petitions did not address the issue of the BMWC Petitioners' attempt to reserve the right to raise additional issues not contained in the BMWC petition or BMWC Supplemental Brief. The Region incorporates its arguments opposing BMWC Petitioners' attempt to raise additional issues not contained in their petition herein. *See* Exhibit 1, Region's Response to Petitioners' Motion for Extension of Time to File Supplemental Brief at 2-6.

Envotech, L.P., 6 E.A.D. 260, 266 (EAB 1996). The Board "strictly construes threshold procedural requirements" like the filing of a thorough, adequate and timely petition and "will relax a filing deadline only where *special circumstances* exist." (emphasis added) *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 2 (EAB 2009) (Order Granting Alternative Motion Extension of Time to File Petitions for Review). The types of "special circumstances" that have arisen where the Board has allowed issues for review to be filed after the deadline for the petition has passed have included mistakes by the permitting authority that have directly precipitated delays in the appeal proceedings and in cases where delays were the result of natural disasters or possible terrorist attacks. *See e.g., In re Avon Custom Mixing Serv., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay in reaching the Board attributable to EPA's response to anthrax contamination concerns); *In re Hillman Power Co., LLC*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (final permit decision not properly served); *AES Puerto Rico*, 8 E.A.D. at 328-29 (extraordinary circumstances created by hurricane and its aftermath warranted relaxation of deadline).

In this case there is no such "special circumstance," and the Region opposes Petitioners' attempt to present additional issues for review before the Board. Nowhere in the BMWC Petition or Supplemental Brief do BMWC Petitioners assert that there are "special circumstances" that justify their request to raise additional issues before the Board. The only justification BMWC Petitioners appear to make to support their request is their alleged lack of access to the administrative record for the Black Mesa Permit. *See* BMWC Supplemental Brief at 3-5. As discussed in detail in the Region's Response to Petitioners' Motion for Extension of Time to File Supplemental Brief at 2-6, Exhibit 1, BMWC Petitioners have the complete administrative record and have had the ability to access all materials on which the Region based its permitting decision.

BMWC Petitioners, in their November 3, 2010 Reply to the Region's Response, again provide no specific information on why there is a special circumstance in this case that would warrant them to raise additional issues before the Board. *See* Petitioners' Reply in Support of Motion for Extension of Time to File a Supplemental Brief ("BMWC Reply") at 2-3. BMWC Petitioners do not allege that the Region made any mistakes that have directly precipitated delays in this appeal process. In the BMWC Reply, BMWC Petitioners appear to take the position that the Region has an obligation to ensure that all entities that may file a petition for review before the Board have a complete copy of the administrative record. *Id.* at 2. To the extent BMWC Petitioners allege an error on EPA's part, the Region notes that its only responsibility under the regulations is to make the administrative record available to the public. 40 C.F.R. 124.18. Here, however, the Region did more than what was minimally required under the regulations; not only did the Region put BMWC Petitioners on notice as of September 16, 2010 that the administrative record was available for review, A.R. at 39-42 (Black Mesa Permit Issuance Letter), over the course of the permitting process the Region provided BMWC Petitioners with the complete administrative record. *See* Region's Response at 2-5 (detailed transactional history regarding the administrative record). As stated in the EAB Practice Manual, it is only *after* a petition for review has been filed with the Board that the Region is required to file with the Clerk of the Board, and to serve upon the petitioner(s), a certified index of all documents in the administrative record of the permit decision. *See* The Environmental Appeals Board Practice Manual at 48. There are no additional documents for Petitioners to review and Petitioners have not presented any "special circumstance" that would warrant the Board allowing them to raise additional issues that were not raised in their Petition or Supplemental Brief.

2. Analysis under the National Environmental Protection Act is not required

BMWC Petitioners argue that the Region violated NEPA by failing to conduct an EIS to analyze any impacts of the Black Mesa Permit. *See* BMWC Petition at 7-8, BMWC Supplemental Brief at 14-16. The BMWC Petition should be denied on this ground since the CWA at section 511(c)(1) specifically exempts the issuance of NPDES permits from the definition of "major federal action significantly affecting the quality of the human environment" within the meaning of NEPA.

Pursuant to NEPA, a federal agency must prepare an EIS for any action that is considered a "major federal action significantly affecting the quality of the human environment." NEPA section 102(2)(C). However, each agency action does not necessarily require the preparation of an EIS. Under NEPA, a federal agency must prepare an EIS *only* when the proposed action is a "major federal action significantly affecting the quality of the human environment." NEPA section 102(2)(C), 42 U.S.C. § 4332(2)(C). *In re: Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460 (EAB 2002). Congress has created a specific exemption to this requirements of NEPA at CWA section 511(c)(1), which states that "no action of the [EPA] taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environmental within the meaning of [NEPA]." In the process of enacting these exemptions, the Senate and House Conference Committee observed, "If the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded." S. Conf. Rep. No. 92-1236, at 149 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3827. Despite their concerns in this vein, the Committee members nonetheless deemed it "sound public policy" to require EPA's compliance with NEPA in two limited circumstances, neither of which is applicable in this case: when EPA issues an NPDES

permit to a "new source" and when EPA provides federal funding for the construction of publicly owned treatment works.[10] CWA section 511(c)(1).

BMWC Petitioners argue that the Region is required to analyze the Black Mesa Permit renewal under NEPA because the site is a "new source." *See* BMWC Petition at 7-8, BMWC Supplemental Brief at 16-17. BMWC supports their position by arguing that the site is a new source because outfall locations that were not covered under the 2000 Black Mesa Permit are covered under this 2010 Black Mesa Permit; ELGs and NSPSs that were promulgated since the last permit issuance are incorporated into the Black Mesa Permit; and because there have been revisions to the Seep Monitoring and Management Plan since the 2000 Black Mesa permit. *See* BMWC Petition at 7-8, BMWC Supplemental Brief at 16-17. BMWC Petitioners are incorrect, and each of their bases for concluding that the site is a "new source" is discussed below.

The term "new source" means "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance [under CWA section 306]." 33 U.S.C. § 1316(a); *see also* 40 C.F.R. 122.2. However, if a specific definition of "new source" was promulgated in a NSPS, and is unique to the applicable point source

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[10] Congress explained that "the owner or operator of what is to be a new source has a degree of flexibility in planning, design, construction, and location that is not available to the owner or operator of an existing source. The Conferees concluded, therefore, that it would be both appropriate and useful for the Administrator to consider the various 'alternatives' described in...NEPA in connection with the proposed issuance of a permit to a new source, whereas...consideration of such 'alternatives' in connection with the proposed issuance of a permit for existing sources, collectively or individually, would not be appropriate...." 118 Cong. Rec. 33,692 ex. 1 (1972), 118 Cong. Rec. 33692; *see Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 114 (D.C. Cir. 1988) (Congress' "new source-existing source distinction is premised upon the policy determination that pollution controls implemented during the period of planning and construction of new plants was 'the most effective and, in the long run, the least expensive approach to pollution control,'" and was to be preferred to the high cost of retrofitting) (quoting S. Rep. No. 92-414, at 58 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3724).

category, that specific definition of "new source" is controlling for determining whether a source is a new source. *See* 40 C.F.R. 122.29(b)(i)-(iii).

In this case, the point source category is "Coal Mining," whose discharges are covered by the ELGs and NSPSs at 40 C.F.R. Part 434. *See* 50 Fed. Reg. 41305 (October 9, 1985); *see also* A.R. at 26 (Black Mesa Fact Sheet at 4). In the general definitions section of 40 C.F.R. Part 434, which apply to all subcategories within the Coal Mining point source category, there is a specialized definition of "new source." The definition states, "[n]otwithstanding any other provision of this Chapter...the term 'new source coal mine' means a coal mine...(i) [t]he construction of which is commenced after May 4, 1984; or (ii) [w]hich is determined by the EPA Regional Administrator to constitute a 'major alteration'."[11] 40 C.F.R. 434.11(j)(1)(1)-(2).

Mining operations at the site began in the early 1970s. A.R. at 24 (Black Mesa Fact Sheet at 2). In this case, the NSPSs promulgated in 1985 that are applicable to the site were promulgated after construction of the mines had commenced. The NSPSs promulgated in 2002 for the Western Alkaline Reclamation Areas subcategory were also promulgated after construction of the mines had commenced.[12] Thus, the site is not a "new source" based on 40 C.F.R. 434.11(j)(1)(i). Additionally, the Region made a determination that there was no "major alteration" of the site pursuant to 40 C.F.R. 434.11(j). A.R. at 45 (RTC at 3). Notably, the

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[11] In making the determination as to whether there is a "major alteration," the Regional Administrator takes into account whether one or more of the following events resulting in a new, altered or increased discharge of pollutants has occurred after May 4, 1984 in connection with the mine: (a) extraction of a coal seam not previously extracted by that mine; (b) discharge into a drainage area not previously affected by wastewater discharges from the mine; (c) extensive new surface disruption at the mining operation; (d) a construction of a new shaft, slope or drift; and (e) such other factors as the Regional Administrator deems relevant. *See* 40 C.F.R. 434.11(j)(ii)(A)-(E).

[12] 40 C.F.R. Part 434, Subpart H, for "Western Alkaline Reclamation Areas" was promulgated on January 23, 2002. *See* 67 Fed. Reg. 3407.

addition or reclassification of outfalls in a permit is not listed as one of the factors that EPA regulations state should be considered by Regions in determining whether there is a "major alteration," and thus a "new source," and the Region correctly determined that the "addition of outfalls is not considered a major alteration." A.R. at 45 (RTC at 3). Thus, the site is not a "new source" based on 40 C.F.R. 434.11(j)(1)(ii).

The Region clearly explained the applicability of these regulations in the Response to Comments. A.R. at 45-46 (RTC at 3-4). The BMWC Petitioners do not, in the BMWC Petition or BMWC Supplemental Brief, argue that the Region's application of the regulations is erroneous. Instead, BMWC Petitioners appear to argue that the Region, by incorporating new regulatory requirements (i.e., the effluent limitations in the Western Alkaline Coal Mining Subcategory ELGs and NSPSs promulgated in 2002 (40 C.F.R. 434.82) in the Black Mesa Permit, must now re-classify the site as a new source. *See* BMWC Supplemental Brief at 16-17. This is incorrect. The BMWC Petitioners ignore the fact that the ELGs and NSPSs in Subpart H apply to both existing and new sources and, pursuant to EPA regulations, the Region was obligated to include the requirements of the 40 C.F.R. 434.82 into the Black Mesa Permit to apply to any discharges from the site that fall within this subcategory. *See* 40 C.F.R. 122.43(b)(2); 122.44. Nothing in the 2002 ELGs and NSPSs for Subpart H altered the coal mining specific definition of "new source" at 40 C.F.R. 434.11(j) discussed above.

BMWC Petitioners also cite the revisions to the permit's Seep Monitoring and Management Plan as significant new information, *see* BMWC Supplemental Brief at 17, implying that revisions to best management practices on a site have relevance as to whether the site is itself a new source. The plan and practices to control or eliminate seeps on a site, or any discharges for that matter, are separate and distinct from the characteristics of the site, however,

and BMWC has provided no explanation or specific information concerning why revisions to the permit conditions related to the unauthorized seeps (that are meant to be more protective of surface waters) would change the classification of a site from an existing source to a new source.

Pursuant to EPA regulations, the site does not meet the definition of "new source coal mine" and is thus not a "new source" under CWA section 306. Since the site is not a new source the CWA section 511(c)(1) exception to NEPA applies and the Region was not required to comply with the requirements of NEPA before issuing the Black Mesa Permit. Thus, the BMWC Petition should be denied on this ground.

3. Clean Water Act

a. The Black Mesa Permit does not authorize the discharge from a new source or new discharger.

BMWC Petitioners argue that the Region violated the CWA by failing to identify whether certain water bodies, that may be receiving waters for discharges from the site, are impaired and for those waters that are impaired, failing to establish TMDLs. Until the Region does so, BMWC Petitioners argue, it may not issue an NPDES permit for new discharges or increasing permitted discharges from the site. *See* BMWC Petition at 6, BMWC Supplemental Brief at 5-10. The BMWC Petition should be denied on this ground since the permitee is not a new source or new discharger.

BMWC Petitioners' argument relies on 40 C.F.R. 122.4(i) and *Friends of the Wild Swan v. U.S. EPA*, 130 F.Supp.2d 1199, 1203 (D.Mo. 2000), *aff'd in part, rev'd in part, remanded by, Friends of the Wild Swan v. U.S. EPA*, 2003 WL 31751849 (9th Cir. Mont. 2003) (hereinafter "*Friends of the Wild Swan*"), for the proposition that the Region can't issue NPDES permits for new or increasing permitted dischargers until the Region has determined whether or not the

receiving waters are impaired and, for any that are, has adopted TMDLs for those receiving waters.

BMWC Petitioners' argument fails since 40 C.F.R. 122.4(i) applies only to new sources or new dischargers. As discussed in detail in Section IV.A.2 above, the Black Mesa Permit is not permitting discharges from "new sources." Also, BMWC Petitioners have never argued that the site is a new discharger, although the Region did explain in its Response to Comments that the site is not a new discharger. A.R. at 54 (RTC at 12). Contrary to the arguments made by BMWC Petitioners, the site is not a "new source" or "new discharger" and thus 40 C.F.R. 122.4(i) does not apply to the discharges from the site and the BMWC Petition should be denied on this ground. Furthermore, Petitioners' reliance of *Friends of the Wild Swan* is inapposite. That case involved 40 C.F.R. 122.4(i), which, as discussed above, does not apply because the permitee is not a new source or new discharger.

b. The Region has complied with all relevant water quality related requirements of the CWA in issuing the Black Mesa Permit

BMWC Petitioners make several arguments in their petition related to the Region's issuance of the Black Mesa Permit and what they allege are failures by the Region to comply with various water quality related requirements of the CWA. BMWC Petitioners argue that the Region failed to properly determine that discharges from the site do not present a "reasonable potential" to cause or contribute to an exceedance of water quality standards. *See* BMWC Petition at 7. Next, BMWC Petitioners argue that the Black Mesa Permit authorizes discharges that will cause or contribute to exceedances of WQSs, because seeps from some impoundments on the site are exceeding WQSs. *See* BMWC Petition at 6, Supplemental Brief at 10-11. Finally, BMWC Petitioners argue that the Region violated the CWA by failing to establish

effluent limitations in the Black Mesa Permit for pollutants other than suspended solids, iron and pH. Each of those issues raised are addressed in detail below, however it is important to restate the basic requirements of the CWA prior to addressing each issue raised by BMWC Petitioners.

CWA section 301(b)(1)(C) requires, in addition to technology-based effluent limitations under CWA section 301(b)(1)(A), any more stringent limitations "including those necessary to meet water quality standards." These are known as "water quality-based effluent limitations" ("WQBELs"). *See also* 40 C.F.R. 122.4(d) (prohibiting the Region from issuing a permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."); 40 C.F.R. 122.44(d)(1) (requiring that the Permit include conditions "necessary" to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."). WQBELs are included in NPDES permits and apply to the various pollutants of concern in order to ensure discharges do not exceed WQSs.

In order to determine whether it is necessary to include WQBELs in an NPDES permit, the permit writer must determine whether the discharge(s) being permitted have the reasonable potential to cause or contribute to an exceedance of water quality standards. *See* 40 C.F.R. 122.44(d)(1)(i) ("[l]imitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [Region] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."). In assessing reasonable potential, the permit writer must consider a variety of factors established by EPA regulations. *See* 40 C.F.R. 122.44(d)(1)(ii).

i. The Region has conducted a proper reasonable potential analysis

BMWC Petitioners argue that the Region failed to properly determine that discharges from the site do not present a "reasonable potential" to cause or contribute to an exceedance of water quality standards. *See* BMWC Petition at 7. The BMWC Petition should be denied on this ground because BMWC Petitioners have failed to demonstrate that this issue was preserved for review since it was not raised with sufficient specificity during the public comment period. Furthermore, the BMWC Petition should be denied on this ground because the Region conducted a proper reasonable potential analysis in accordance with the relevant EPA regulations.

As a threshold matter, BMWC Petitioners have failed to demonstrate that their argument – that EPA failed to properly determine that discharges from the site do not present a reasonable potential to cause or contribute to an exceedance of water quality standards – was "raised with sufficient specificity during the public comment period" to preserve review by the Board. *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240; *see also* BMWC Petition at 7; 40 C.F.R. 124.13, 124.19(a); *In re: City of Attleboro*, NPDES Appeal No. 08-08, at 10; *In re City of Moscow*, 10 E.A.D. at 141. BMWC Petitioners cite to page 7 of their comments on the proposed permit to support their argument, A.R. at 310 (BMWC Comments at 7); however their comments do not address the sufficiency of the Region's reasonable potential analysis in the draft permit. *See* A.R. at 112-113 (Proposed Black Mesa Permit at 6-7). BMWC Petitioners' comments on pages 6-7 address the monitoring requirements in the draft permit. *See* A.R. at 309-310 (BMWC Comments 6-7). The only comment the Region received regarding its reasonable potential analysis was a request that the Region "conduct a reasonable potential analysis," A.R. at 54 (RTC at 12). The Region had already completed this analysis for the proposed permit and prior to issuance of the final Black Mesa permit. A.R. at 54 (RTC 12), A.R. at 28-29 (Fact Sheet at 6-

7); A.R. at 112-113 (Proposed Black Mesa Permit at 6-7). However, the Region did not receive comments that its reasonable potential analysis was flawed or that it relied on incorrect or inappropriate data. Since petitioners have the burden to demonstrate an issue was raised with sufficient specificity during the public comment period to preserve review before the Board the petition should denied on this ground.[13]

In terms of substance, the Black Mesa Permit includes a reasonable potential analysis. A.R. at 28-29 (Fact Sheet at 6-7). Based on an application of the factors at 40 C.F.R. 122.44(d)(1)(ii)[14] to the permitted discharges from the site, and examination of the projected wastewater quality data provided in the application, the Region concluded that the discharges from the site do not present a "reasonable potential" to cause or contribute to an exceedance of water quality standards. A.R. at 28-29 (Black Mesa Fact Sheet 6-7); A.R. at 54-57 (RTC at 12-15). Because the discharges are often to dry washes without dilution, the Region has not considered available dilution in its assessment. Therefore, the Region made the most conservative and protective assumption of no available dilution in its analysis. A.R. at 29 (Black Mesa Fact Sheet at 7); A.R. at 55 (RTC at 13). Permitted discharges from the site are infrequent; with over 100 permitted outfalls located over a 65,000 acre lease area, the facility has discharged 31 times over the five years from 2005-2009. A.R. at 29 (Black Mesa Fact Sheet at 7); A.R. at 55 (RTC at 13). All drainages are treated in pond systems to remove sediment accumulated from the mining activities prior to discharge. A.R. at 29 (Black Mesa Fact Sheet at 7); A.R. at 55

[13] BMWC Petitioners do not include or expand on this argument in their Supplemental Brief, but rely entirely on one sentence in their petition. BMWC Petition at 7.

[14] The relevant factors include dilution in the receiving water; existing data on toxic pollutants; type of industry; history of compliance problems and toxic impacts; and type of receiving water and designated use. *See* 40 C.F.R. 122.44(d)(1)(ii).

(RTC at 13). Based on sampling data and an evaluation of characteristics of prior discharges, the Region concluded that the technology-based effluent limitations for pH, suspended solids, oil and grease, and iron that are included in the Black Mesa Permit are sufficient to meet receiving water quality standards for those pollutants and that there is no reasonable potential for other pollutants to cause or contribute to a violation of receiving water standards. A.R. at 29 (Black Mesa Fact Sheet 7); A.R. at 54-57 (RTC at 12-15).

BMWC Petitioners have made no credible argument that the Region's reasonable potential analysis for the authorized discharges is clearly erroneous. BMWC Petitioners argue that such an analysis must be based on actual monitoring data from all outfalls and impoundments on site, *see* BMWC Petition at 7, however 40 C.F.R. 122.44(d)(1)(ii) contains no such requirement. Nevertheless, the Region's reasonable potential analysis did rely on actual monitoring data from discharges from the outfalls on the site that was provided by permitee in its permit application. *See* A.R. at 28-29 (Black Mesa Fact Sheet 6-7); A.R. at 54-55 (RTC at 12-13). Additionally, BMWC Petitioners have not alternatively presented any evidence that there is in fact a reasonable potential for pollutants discharged from the site to cause or contribute to a violation of receiving water standards. *See In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005).

The Region has included monitoring requirements in the permit for several pollutants and additional parameters, including flow, arsenic, cadmium, chromium, lead, mercury, and selenium for discharges in order to further verify these conclusions. A.R. at 3-7 (Black Mesa Permit at 3-7). Additionally, although the Region has determined that the permitted discharges do not have a reasonable potential to cause or contribute to an exceedance of water quality standards, the Black Mesa Permit includes general conditions based on narrative water quality standards contained in

Section 203 of the NNSWQS and Chapter 3 (General Standards) of the Hopi Water Quality Standards which prohibits the discharge of any pollutant which will "cause injury to, are toxic to, or otherwise adversely affect human health, public safety or public welfare" or "habitation, growth, or propagation or indigenous aquatic plans and animal communities." A.R. at 10-12 (Black Mesa Permit at 10-12); A.R. at 55 (RTC at 13); *see also* A.R. 1331 (Cover Page of Navajo Water Quality Standards); A.R. 1332 (Cover Page of Hopi Water Quality Standards).

ii. The Black Mesa Permit does not authorize discharges that will cause or contribute to exceedances of WQSs

BMWC Petitioners argue that the Black Mesa Permit authorizes discharges that will cause or contribute to exceedances of WQSs. *See* BMWC Petition at 6, Supplemental Brief at 10-11. The BMWC Petition should be denied on this ground because BMWC Petitioners have failed to demonstrate that this issue was preserved for review as they have simply repeated their comments on the draft permit and have failed to explain in their petition why the Region's response to that comment was clearly erroneous or an abuse of discretion. Furthermore, the BMWC Petition should be denied on this ground because the Region conducted a reasonable potential analysis and concluded that the discharges authorized by the Black Mesa Permit do not have a reasonable potential to cause or contribute to exceedances of water quality standards. A.R. at 28-29 (Black Mesa Fact Sheet 6-7). Additionally, as far as BMWC Petitioners' argument relies on data from seeps from impoundments on site, their reliance is misplaced, as the seeps from the impoundments are distinct and separate from the 111 outfalls on site and the Black Mesa Permit does not authorize seeps.

As a threshold matter, BMWC Petitioners have not preserved this issue for review and thus, the BMWC Petition should be denied. BMWC Petitioners have simply repeated in their

petition their comments on the proposed permit that the Black Mesa Permit authorizes discharges that will cause or contribute to exceedances of WQSs and BMWC Petitioners have failed to explain why the Region's response to that comment was clearly erroneous or an abuse of discretion. *See* A.R. 310 (BMWC Comments at 7); A.R. at 56-57, 60 (RTC at 14-15, 18); BMWC Petition at 6, BMWC Supplemental Brief at 10-11; *see also In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. The BMWC Petitioners' only statement responding to the Region's Response to Comments on this issue states that the Region "provides no legal authority for its proposed use of variances." BMWC Supplemental Brief at 11. This statement in their Supplemental Brief in no way responds to the Region's actual response as to why the Black Mesa Permit does not authorize discharges that cause or contribute to exceedances of WQS, *see* A.R. at 56-57 (RTC at 14-15) ("[t]o meet this duty, EPA has conducted a reasonable potential analysis and concluded that the discharges regulated under the NPDES permit do not have a reasonable potential to cause or contribute to exceedances of water quality standards"). Additionally, the Region specifically stated in the Response to Comments that "[t]he reissued permit does not allow for, nor does it authorize, any variances at the Black Mesa Mine Site." A.R. at 60 (RTC at 18).

In terms of substance, the BMWC Petition should be denied since, as explained in detail above in Section IV.A.3.b.i, prior to the issuance of the Black Mesa Permit, the Region conducted a reasonable potential analysis and concluded that, after application of the technology-based effluent limitations, the discharges authorized by the Black Mesa Permit do not have a reasonable potential to cause or contribute to exceedances of WQS. A.R. at 28-29 (Black Mesa Fact Sheet 6-7). Accordingly, the Region appropriately concluded that the Black Mesa Permit does not authorize discharges that will cause or contribute to exceedances of WQSs.

To the extent BMWC Petitioners are relying on data from seeps from impoundments on site to support their argument that discharges authorized by the permit cause or contribute to exceedances of WQS or that WQBELs need to be included in the permit, they are mistaken as to the nature of the Black Mesa Permit and their reliance is misplaced. *See* BMWC Supplemental Brief at 11.[15] The Black Mesa Permit does *not* authorize the discharge of pollutants via seeps. A.R. at 30 (Black Mesa Fact Sheet). The seeps are separate and distinct from the outfalls and are not included in the 111 outfalls that are authorized under the permit. A.R. at 30 (Black Mesa Fact Sheet at 8); A.R. at 58-59 (RTC at 16-17).

As stated in the Black Mesa Fact Sheet, "[a] seep is an area *not* related to the [permitted] outfall location" (emphasis added). A.R. at 30 (Black Mesa Fact Sheet at 8). Many of the seeps "do not exhibit measurable volumes of flow" and the seeps typically "will disappear back into the soils within a short distance" of the impoundment. A.R. at 30 (Black Mesa Fact Sheet at 8). "In general the seeps are small in number, low in flows, and may not result in a discharge to a water of the United States. Many of the seeps are simply moist areas which do not generate actual flow volumes. Additionally, many other seeps are in locations from which discharges do not reach waters of the United States." A.R. at 59 (RTC at 17).

Since the previous permit, the permitee has monitored and characterized the seeps on site. A.R. at 58 (RTC 16). The permitee implements a Seep Monitoring and Management Plan, at all impoundments on the site, in order to characterize and implement corrective actions to

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[15] The data BMWC Petitioners point to was provided by the permitee and is from the monitoring of the seeps on site. *See* Black Mesa Supplemental Brief at 13. BMWC Petitioners' Supplemental Brief cites to pages 9-11 of the Black Mesa Permit for examples of ongoing water quality standard violations. There is no such data on pages 9-11 of the Black Mesa Permit, the Region can only assume BMWC Petitioners are referring to the "seep characterization" on pages 10-11 of the Black Mesa Fact Sheet. A.R. at 32-33.

address and eliminate all seeps. A.R. at 59 (RTC at 17). For the seeps that have a higher level of risk to water quality the permitee and the Region prioritized measures to address the seeps, such as the elimination of the impoundments causing the higher levels of risk to water quality. A.R. at 33-34 (Black Mesa Fact Sheet at 11-12). Since the Black Mesa Permit does not authorize discharges of pollutants to waters of the United States via seeps, but in fact, through the Seep Monitoring and Management Plan, seeks to eliminate the seeps, the imposition of WQBELs for pollutants only present in the seeps would be inappropriate and unnecessary.[16] The Black Mesa Permit in no way authorizes the discharge of pollutants that would cause or contribute to an exceedance of WQSs and the BMWC Petition should be denied on this ground.

iii. The Black Mesa Permit establishes appropriate effluent limitations for pollutants of concern

BMWC Petitioners argue that the Region violated the CWA by failing to establish effluent limitations in the Black Mesa Permit for pollutants other than suspended solids, iron and pH.[17] BMWC Petition at 6; BMWC Supplemental Brief at 13. The BMWC Petition should be denied on this ground because BMWC Petitioners have not preserved this issue for review since their allegation lacks specificity. Furthermore, the BMWC Petition should be denied on this ground because, as discussed above in Section IV.A.3.b.i, the Region conducted a reasonable potential analysis and concluded that the discharges authorized by the Black Mesa Permit do not

[16] For these same reasons, it would be inappropriate and unnecessary for the Region to conduct a reasonable potential analysis for the seeps. BMWC Supplemental Brief at 7.

[17] The Region notes that there are in fact numeric effluent limitations for oil and grease in the Black Mesa Permit that are applicable to discharges from the site. A.R. at 4 (Black Mesa Permit at 4).

have a reasonable potential to cause or contribute to exceedances of water quality standards. A.R. at 28-29 (Black Mesa Fact Sheet 6-7).

As a threshold matter, BMWC Petitioners have not preserved this issue for review and the BMWC Petition should be denied on this ground, since their allegation lacks specificity. Under 40 C.F.R. 124.19, the petitioner must explain what condition is being challenged and why the challenged condition(s) merit review. *See e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 (EAB 2002). In doing so the petitioner must not only identify the disputed issues but demonstrate the specific reasons why review is appropriate. *See In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992). BMWC Petitioners' abbreviated contention lacks any specificity concerning what additional pollutants should be controlled or the bases for including any such additional limitations in the permit. *See* BMWC Petition at 6, BMWC Supplemental Brief at 13. BMWC Petitioners simply leave the Region guessing as to what additional effluent limitations they believe are necessary for discharges covered under the Black Mesa Permit. BMWC Petitioners provide no explanation or any information in the BMWC Petition as to whether the Region should have included additional technology-based effluent limitations[18] and/or additional water quality-based effluent limitations in the Black Mesa Permit. Nor do

[18] As far as BMWC Petitioners are challenging the scope or substance of the technology-based effluent limitations (i.e., 40 C.F.R. Part 434) that were incorporated into the Black Mesa Permit via 40 C.F.R. 122.43(b)(2) and 40 C.F.R. 122.44, based on the ELGs and NSPSs for the Coal Mining Point Source Category, the BMWC Petition must fail. As the Board has often stated, it will not entertain challenges to final Agency regulations in the context of permit appeals. *See In re USGen New Eng., Inc.*, 11 E.A.D. 525, 555 (EAB 2004), *dismissed appeal for lack of juris.*, 443 F.3d 12 (1st Cir. 2006); *In re City of Irving*, 10 E.A.D. 111, 123-25 (EAB 2001), *petition for review denied sub nom. City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003); *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001); *In re City of Port St. Joe*, 7 E.A.D. 275, 286 (EAB 1997); *see also In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991).

BMWC Petitioners explain what specific pollutants those effluent limitations should have been applied to and present no "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. at 291. Due to BMWC Petitioners' lack of specificity their petition should be denied on this ground.

As far as BMWC Petitioners may be arguing for WQBELs for particular pollutants to be included in the Black Mesa Permit, as discussed above in Section IV.A.3.b.i., the Region conducted a reasonable potential analysis and determined there was no reasonable potential of discharges authorized by the permit to cause or contribute to an exceedance of WQSs. Based upon that finding, the Region determined it was not necessary to include any pollutant specific WQBELs in the Black Mesa Permit. *See* 40 C.F.R. 122.44(3)(1)(i). As noted above in Section IV.A.3.b.i, Petitioners have failed to provide any explanation as to why the Region's reasonable potential analysis was clearly erroneous.

To the extent that BMWC Petitioners may be arguing that the Black Mesa Permit should include WQBELs for pollutants that have been found to be present in seeps, as explained in Section IV.A.3.b.ii, BMWC Petitioners are incorrect as the Black Mesa Permit does *not* authorize the discharge of pollutants via seeps. A.R. at 30 (Black Mesa Fact Sheet). The seeps are separate and distinct from the outfalls and are not included in the 111 outfalls that are authorized under the permit. A.R. at 30 (Black Mesa Fact Sheet at 8); A.R. at 58-59 (RTC at 16-17). Additionally, it would be inappropriate to impose WQBELs for discharges from any of the 111 outfalls based on monitoring data from seeps because the Region concluded "that many pollutant levels found at the seep locations were caused by the seepage activity itself (during which stormwater infiltrates certain soil layers) and not by mining activities themselves.

Therefore, the water characterization of the seeps must be considered separately from both the water quality of the stormwater contained in the ponds and the water quality of the discharges from authorized outfalls." A.R. at 59 (RTC at 17).

The BMWC Petition should be denied on this ground because BMWC Petitioners have not met their burden demonstrating that review by the Board is warranted: they do not provide specific information in support of their allegation and make no argument concerning *why* the Region erred on this aspect of the Black Mesa Permit.

c. The Black Mesa Permit includes appropriate monitoring requirements

BMWC Petitioners argue that the Region violated the CWA for failing to require monitoring of all discharges from all 111 outfalls covered by the Black Mesa Permit. *See* BMWC Petition at 6, BMWC Supplemental Brief at 11-13. The BMWC Petition should be denied on this ground because BMWC Petitioners simply repeat their objections made during the comment period, *see* A.R. at 309-310 (BMWC Petitioners' April 27, 2010 Comments on proposed Black Mesa Permit at 6-7) (hereinafter "BMWC Comments"), and provide no discussion of why the Region's response to their comments, *see* A.R. at 60-62 (RTC at 18-20), is clearly so erroneous as to warrant review. Furthermore, the BMWC Petition should be denied on this ground because the Black Mesa Permit does, in fact, require monitoring of the discharges from the site in accordance with the requirements of the CWA and its implementing regulations.[19]

[19] BMWC Petitioners also claim the Region unlawfully granted Peabody a "monitoring waiver" pursuant to 40 C.F.R. 122.44(a)(2). BMWC Petition at 11-12. As the Region explained in its Response to Comments the permitee did not request a waiver and EPA has not granted a waiver. A.R. at 60 (RTC at 18).

As a threshold matter, BMWC Petitioners have not preserved this issue for review since they have simply repackaged their comments on the draft permit. *See* A.R. 309-310. The Region responded in detail to BMWC Petitioners' concerns related to monitoring requirements and the legal authority under which the Region had structured the monitoring requirements in the Black Mesa Permit. A.R. at 60-62 (RTC at 18-20). BMWC Petitioners simply repeat the objections they made during the comment period, *see* A.R. at 309-310 (BMWC Comments at 6-7), and in no way discuss in the BMWC Petition, specifically at 6, or the BMWC Supplemental Brief, specifically at 11-13, why the Region's response to those objections is clearly erroneous or otherwise warrants review and thus, the BMWC Petition should be denied on this ground. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240.

In terms of substance, the Black Mesa Permit establishes differentiated monitoring requirements for a number of parameters, including flow, TSS, pH, oil & grease, iron, cadmium, chromium, mercury, lead, and selenium, based on the source and type of the discharge from the site. *See* A.R. at 3-8, 13-16 (Black Mesa Fact Sheet 3-8, 13-16).

For dry weather discharges, such as dewatering of ponds on site, all of the 103 outfalls that are categorized as either "Alkaline Mine Drainage" or "Coal Preparation Plants, Storage Areas, and Ancillary Area Runoff" must comply with daily monitoring requirements. A.R. at 3-4 (Black Mesa Permit at 3-4). For precipitation related discharges, a representative sample of at least 20% of the 103 outfalls that are categorized as either "Alkaline Mine Drainage" or "Coal Preparation Plants, Storage Areas, and Ancillary Area Runoff" must comply with daily monitoring requirements. A.R. at 6-8 (Black Mesa Permit at 6-8). The eight remaining outfalls on the site, categorized as "Western Alkaline Reclamation Areas," are subject to the

requirements of 40 C.F.R. Subpart H. In accordance with 40 C.F.R. 434.82, the Black Mesa Permit establishes non-numeric effluent limitations for these eight outfalls and while there are no numeric effluent monitoring requirements established for those outfalls there is a requirement in the Black Mesa Permit that discharges from these eight outfalls be monitored to ensure compliance with the permit, including that the average annual sediment yields will not be greater that the sediment level yields from pre-mined, undisturbed conditions. A.R. at 5 (Black Mesa Permit at 5).

The BMWC Petitioners' assertion that the Region "[failed] to require monitoring of discharge (sic) from all 111 outfalls covered by the NPDES permit" is misleading and incorrect. BMWC Petition at 6. As highlighted above, the Black Mesa Permit requires some form of monitoring for all of the 111 outfalls covered by the permit. *See also* A.R. at 1-8 (Black Mesa Permit at 1-8). Not only should it have been apparent to BMWC that the Region did not grant a monitoring waiver under 40 C.F.R. 122.44(a), but the Region explained this clearly in its Response to Comments. A.R. at 61 (RTC at 19) ("Section A of the [Black Mesa] [P]ermit establishes...monitoring requirements for 111 outfalls...").[20] Thus, the entire discussion by BMWC Petitioners regarding the Region granting "Peabody a monitoring waiver" is inapposite and the petition should be denied on this ground. *See* BMWC Supplemental Brief at 11-12.

[20] It appears that BMWC Petitioners may have misconstrued the provisions of the permit allowing for representative monitoring during precipitation events as a monitoring waiver. As discussed more fully below, those monitoring provisions allow, where appropriate, for compliance for all 111 outfalls to be determined by representative sampling, at a minimum of 20% of the outfalls. *See* Black Mesa Permit at 6 ("During precipitation events, samples may be collected from a sampling point representative of the type of discharge, rather than from each point of discharge. At no time shall less than 20% of discharges be sampled.").

For precipitation related events, the Black Mesa Permit establishes monitoring requirements that will be representative of the type of discharge. A.R. at 6 (Black Mesa Permit at 6). As stated in the Region's Response to Comments "[t]hese areas are materially similar in terms of the mining activities that take place within that area, the alkaline characteristics of soil types present (e.g., not acid generating), the expected runoff pollutant concentrations, the type of stormwater treatment and best management practices employed and the effluent limitations applicable to the discharge." A.R. at 62 (RTC at 20). Thus, in this case, the Region determined that based on the record it was reasonable to allow for representative monitoring of the outfalls classified as either "Alkaline Mine Drainage" or "Coal Preparation Plants, Storage Areas, and Ancillary Area Runoff" for stormwater discharges based on precipitation related events to obtain representative monitoring, with the proviso that "[a]t no time shall less that 20% of discharges be sampled.". A.R. at 62 (RTC at 20); A.R. at 6 (Black Mesa Permit at 6). BMWC Petitioners state (as they did in their comments on the draft permit) that they find no authority that would allow representative monitoring and they object to a lack of a discussion concerning the selection of monitoring sites for the permit. *See* BMWC Supplemental Brief at 13; A.R. at 309-310 (BMWC Comments at 6-7). However, as the Region stated in its response to comment document, and BMWC fails to address in its petition, EPA regulations state that "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." 40 C.F.R. 122.41(j)(1); A.R. at 61-62 (RTC at 19-20).[21] In this case, for some types of discharges the

[21] It should also be noted that, although not specifically referenced in the response to comment document, 40 C.F.R. 122.48 also recognizes the authority of the Agency to provide for representative monitoring: "All permits shall specify…[r]equired monitoring including the type, intervals, and frequency sufficient to yield data which are *representative of the monitored activity*…." (emphasis added).

Region determined that representative monitoring of a minimum of 20% of the outfalls for precipitation related events permitted under the Black Mesa Permit was appropriate and the petition should be denied on this ground.[22]

d. The Region appropriately considered all relevant information related to OSM's technical review of the Sediment Control Plan when re-issuing the Black Mesa Permit

BMWC Petitioners argue that the Region abused its discretion when it considered OSM's "technical review" of the "Sediment Control Plan" during permit reissuance.[23] *See* BMWC Petition at 7; BMWC Supplemental Brief 13-14. The BMWC Petition should be denied on this ground, because BMWC Petitioners simply repeat the objections they made during the comment period and provide no discussion of why the Region's response to their comments is clearly so erroneous as to warrant review. Additionally, the Region issued the permit pursuant to the CWA, and the January 5, 2010 decision by Interior Administrative Law Judge Holt which vacates the site's Life of Mine permit issued by OSM pursuant to the Surface Mining and Control Reclamation Act ("SMCRA") that BMWC Petitioners rely on, is immaterial.

As a threshold matter, BMWC Petitioners have not preserved this issue for review since they have simply repackaged their comments on the draft permit. *See* A.R. 313. The Region

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[22] BMWC Petitioner also argues that the Region provided no explanation for choosing the locations to be monitored. BMWC Supplemental Brief at 13. As explained above, for dry weather discharges all of the 103 outfalls that are categorized as either "Alkaline Mine Drainage" or "Coal Preparation Plants, Storage Areas, and Ancillary Area Runoff" must comply with daily monitoring requirements. For precipitation related events, it is up to the permitee, not the Region, to determine what outfalls will provide representative monitoring data of the discharges from the site.

[23] Throughout the administrative record there are references to both "OSM" and "OSMRE." These abbreviations are referencing the same federal agency – the Office of Surface Mining Reclamation and Enforcement within Interior. For purposes of this brief, unless quoting the administrative record, the Region with use the abbreviation "OSM."

responded to BMWC Petitioners' concerns related to OSM's technical review of the Sediment Control Plan. *See* A.R. at 63 (RTC at 21). BMWC Petitioners simply repeat the objections they made during the comment period, see A.R. at 313-315 (BMWC Comments at 10-12), and in no way demonstrate in the BMWC Petition, specifically at 7, or in the BMWC Supplemental Brief, specifically at 13-14, why the Region's response to those objections is clearly erroneous or otherwise warrants review, and thus the BMWC Petition should be denied on this ground. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240.

Operators of sites whose discharges are subject to the "Western Alkaline Reclamation Areas" requirements of 40 C.F.R. 434.82, Subpart H, generally must submit a site-specific Sediment Control Plan to the permitting authority that is designed to prevent an increase in the average annual sediment yield from pre-mined, undisturbed conditions. 40 C.F.R. 434.82(a). The operator of the site must use the same watershed model that was, or will be, used to acquire any necessary permits under SMCRA. 40 C.F.R. 434.82(b).

When the Region is the permitting authority, it has the responsibility to determine whether a Sediment Control Plan is designed to prevent an increase in the average annual sediment yield from pre-mined, undisturbed conditions for purposes of 40 C.F.R. 434.82. In promulgating Subpart H, EPA envisioned that the sediment yield modeling and Sediment Control Plan would often provide sufficient review to satisfy the permitting authority (e.g., EPA Regional Offices). *See* 67 Fed. Reg. 3370, 3383 (January 23, 2002). On December 19, 2003, the Region and OSM established a Memorandum of Understanding ("MOU") in order to coordinate the evaluation of Sediment Control Plans for purposes of the CWA and SMCRA. *See* A.R. at 1139-1141 (MOU). The 2003 MOU solidified an agreement between the Region and OSM that

"Sediment Control Plans for a mine site should be incorporated into one document that is satisfactory to both the CWA and SMCRA permitting authorities." A.R. at 1139 (MOU at 1). OSM has technical expertise in areas related to the control of sediment at mines. This expertise includes watershed modeling utilized during the SMCRA permitting process, which the Region finds helpful in the NPDES permitting process.

In this case, the permitee, pursuant to the terms of EPA regulations and the 2003 MOU, submitted a draft Sediment Control Plan to the Region and OSM on September 28, 2008, A.R. at 1142-1264, and a revised plan on April 24, 2009, A.R. at 1279-1295,[24] for the purpose of: (1) re-categorizing, as necessary, outfalls subject to the effluent limitations in Subpart H of 40 C.F.R. Part 434 for purposes of the Black Mesa Permit under the CWA and (2) applying for a revision of its Life of Mine permit under SMCRA. The Region and OSM both reviewed the draft Sediment Control Plan. A.R. at 1276 (OSM Technical Evaluation of Permit at 2). OSM concluded that the draft Sediment Control Plan complied with all applicable regulatory requirements related to SMCRA and noted that all of the information required by 40 C.F.R. 434.82(a) was present and that there was compliance with 40 C.F.R. 434.82(b) based on the reduction in sediment yield and land stabilization. A.R. at 1276-1277 (OSM Technical Evaluation of Permit at 3). The Region concurred with OSM's determination that the Sediment Control Plan is consistent with the requirements of Subpart H. A.R. at 27-28 (Black Mesa Fact Sheet at 5-6).

[24] The permitee was required to submit a revised Sediment Control Plan because OSM had concerns with discharges of selenium from two impoundments. A.R. at 1275. Based on OSM's comments the permitee removed two outfalls from consideration, and submitted a revised Sediment Control plan for the remainder of the impoundments. A.R. at 1275.

The only rationale that BMWC Petitioners offer in support of their allegation that the Region incorrectly relied on OSM's technical review of the Sediment Control Plan is the January 5, 2010 decision by Interior Administrative Law Judge Holt that vacated the Life of Mine permit *under SMCRA*. *See* BMWC Supplemental Brief at 13-14. However, the vacatur of the Life of Mine permit under SMCRA has no impact on the Black Mesa Permit under the CWA or the Region's ability to utilize OSM's expertise. Judge Holt's vacatur was based on NEPA – the alternatives analysis for the final EIS for the Life of Mine permit did not reflect the fact that the Black Mesa mine had closed for a period of time since the draft EIS had been issued. A.R. at 1348-1389 (Judge Holt's Decision). The decision does not call into question the validity of the technical review conducted by OSM regarding the Sediment Control Plan. The BMWC Petitioners have cited no authority for why the Region must first wait until a final Life of Mine permit is promulgated under SMCRA, and upheld by the administrative review process within Interior, before relying on the expert opinions within OSM, for purposes of the CWA, especially given that the validity of OSM's technical review has in no way been called into question.

It is notable that BMWC Petitioners do not in fact challenge the substance of the technical review by OSM or the Region's determination that the Sediment Control Plan contained all the necessary and appropriate text, appendices, surface water modeling results for the applicable areas, methodology for pond removal, and sediment control traps necessary to control the discharge of pollutants from the site. A.R. at 1276-1277 (OSM Technical Evaluation of Permit at 3); A.R. at 27-28 (Black Mesa Fact Sheet at 5-6). While the Region relied, in part, on the technical review and expertise of OSM to ensure that the minimum requirements of 40 C.F.R. 434.82 are present, and that the Sediment Control Plan will result in sediment yields no greater than sediment yields from pre-mined conditions, the Region made the ultimate

determination as to the sufficiency of the Sediment Control Plan, as stated in the Black Mesa Fact Sheet. A.R. at 27-28 (Black Mesa Fact Sheet at 5-6) ("[the Region] has determined that [the permitee] has met the basic requirements of Subpart H"). As stated before, a petitioner seeking review of issues that are technical in nature bear a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *See In re: City of Attleboro*, NPDES Appeal No. 08-08, at 11; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. at 667.

In this case, BMWC Petitioners have failed to even meet the minimum threshold burden under 40 C.F.R. 124.19 to preserve review on this issue, *see In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240, let alone satisfy the heavy burden of challenging the Region's judgment and determination regarding the technical nature of the Sediment Control Plan. *In re: City of Attleboro*, NPDES Appeal No. 08-08, at 11; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. at 667. Moreover, because there was nothing unlawful or unreasonable with the Region relying on OSM's technical review in making its determination that the Sediment Control Plan met the requirements of 40 C.F.R. Part 434, Subpart H and the BMWC Petition should be denied on this ground.

e. The Region correctly did not analyze potential discharges of dredged or fill material covered under CWA section 404 associated with the site in issuing the Black Mesa Permit

BMWC Petitioners argue that the Region failed to ensure that the proper CWA section 404 permits were issued and/or will be issued by the Corps for discharges of dredged or fill material on the site. *See* BMWC Petition at 7; BMWC Supplemental Brief at 14. The BMWC Petition should be denied on this ground because BMWC Petitioners simply repeat the objections they made during the comment period and provide no discussion of why the Region's

response to their comments is clearly so erroneous as to warrant review. Furthermore, the BMWC Petition should be denied because the challenged permit does not "address, nor authorize any activity which results in the discharge of dredged or fill material to a water of the U.S." A.R. at 83 (RTC at 41).

As a threshold matter, BMWC Petitioners have not preserved this issue for review since they have simply repackaged their comments on the draft permit and have failed to explain in their petition why the Region's response to that comment was erroneous or an abuse of discretion. *See* A.R. 309. The Region responded to BMWC Petitioner's comments related to permitting under CWA section 404. *See* A.R. at 82-83 (RTC at 40-41). BMWC Petitioners simply repeat their objections made during the comment period, see A.R. at 309 (BMWC Comments at 6), and do not demonstrate in the BMWC Petition, specifically at 7, or the BMWC Supplemental Brief, specifically at 14, why the Region's response to those objections is clearly erroneous or otherwise warrants review and thus the BMWC Petition should be denied on this ground. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240.

In terms of substance, the Black Mesa Permit renewal was undertaken pursuant to CWA section 402 for the discharge of pollutants from a point source to waters of the United States. The Black Mesa Permit does not address, nor authorize any activity which results in the discharge of dredged or fill material to a water of the United States, which is permitted under CWA section 404, and thus any argument related to these discharges is outside the scope of the review of the reissuance of the Black Mesa Permit by the Region and the BMWC Petition should be denied on this ground.

Though outside the scope of the Board's review, it is worth noting that, as a general rule, under the CWA, discharges of dredged or fill material into a water of the United States are be permitted by Corps, not EPA. *See* CWA section 404(a). 33 U.S.C. § 1344(a); 33 C.F.R. Part 323. There is no requirement in the NPDES permitting regulations for the permitting authority to include a requirement that the permittee obtain a CWA section 404 permit for any associated discharges of dredged or fill material. In issuing a permit under CWA section 404 the Corps evaluates permit applications pursuant environmental criteria established by EPA set forth in the CWA section 404(b)(1) Guidelines. 33 U.S.C. § 1344(b)(1); *see also* 40 C.F.R. 230.10. Additionally, the Region has the ability to review and comment on permit applications submitted to the Corps. *See generally* 33 CFR 325.2(a)(2)-(3); 30 CFR 325.3. Also, the Region may elevate specific cases, if there is disagreement with the Corps District on particular permitting decision, for resolution. *See* CWA section 404(q); 33 U.S.C. § 1344(q); *see also* Clean Water Act Section 404(q) Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army (1992). Lastly, EPA has the authority to prohibit, deny or restrict the use of any defined site as a disposal site for dredged or fill material. CWA section 404(c); 33 U.S.C. § 1344(c). Thus, the Region has plenty of tools under the CWA to ensure that any CWA section 404 permits issued by the Corps for discharges of dredged or fill material on the site meet the requirements of the CWA.

4. The Region complied with all requirements of the Endangered Species Act

BMWC Petitioners argue that the Region failed to comply with the ESA for failing to engage in consultation with the relevant Interior agency, the U.S. Fish & Wildlife Service ("FWS"), prior to issuance of the Black Mesa Permit. The BMWC Petition should be denied on

this ground since BMWC Petitioners simply repeat their objections made during the comment period, *see* A.R. at 314-320 (BMWC Comments at 11-17), and provide no discussion whatsoever in the BMWC Petition, specifically at 8, or in the BMWC Supplemental Brief, specifically at 19-29, of why the Region's response to their comments is clearly so erroneous as to warrant review. Should the Board look beyond this fatal jurisdictional defect, BMWC Petitioners' claim should be rejected on the merits, since the Region made a reasonable determination that no listed species or critical habitat would be affected by the Black Mesa Permit, and thus no interagency consultation was required under the ESA.

As a threshold matter, BMWC Petitioners have not preserved an ESA issue for review given that they have simply repeated, verbatim, comments they made on the draft permit.[25] *See* A.R. 314-320 (BMWC Comments 12-17). The Region responded to BMWC Petitioners' specific concerns related to ESA consultation and explained why the Region made the "no effect" determination and thus has complied with all ESA requirements. A.R. at 314-320 (RTC at 30-34). BMWC Petitioners simply repeat their objections made during the comment period and do not demonstrate in the BMWC Petition or the BMWC Supplemental Brief why the Region's response to those objections is clearly erroneous or otherwise warrants review, and thus the BMWC Petition should be denied on this ground. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240.

In terms of substance, if an agency determines that its action will have no effect on listed species or designated habitat, the agency does not need to engage in consultation, the ESA section 7 process ends, and the agency's responsibilities under the ESA have been fulfilled. *See*

[25] BMWC Petitioners have in fact not only repeated their comments but they have copied word for word their April 27, 2010 comment letter and inserted it into their Supplemental Brief.

50 C.F.R. § 402.14(a); *In re: Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460, NPDES Appeal No. 01-07 (EAB 2002); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447-48 (9th Cir. 1996). The federal courts have held that an agency's "no effect" determination under the ESA must be upheld unless it is arbitrary and capricious. *See Or. Natural Res. Council v. Allen,* 476 F.3d 1031, 1036 (9th Cir. 2007). In determining whether the agency's no effect decision was arbitrary and capricious, the federal courts have held that critical to the inquiry is whether there is "a rational connection between the facts found and the conclusions made" in support of the agency's action. *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1195 (9th Cir. 2010), (quoting *Or. Natural Res. Council v. Brong,* 492 F.3d 1120, 1131 (9th Cir.2007)); *Nat'l Ass'n of Home Builders v. Norton,* 340 F.3d 835, 841 (9th Cir.2003) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 105, (1983)) (the agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made").

In this case, the Region evaluated the potential effect of the discharges authorized by the Black Mesa Permit on threatened and endangered species. A.R. at 34-36 (Black Mesa Fact Sheet at 12-14); A.R. at 72-76 (RTC at 30-34). Based on that evaluation, the Region concluded that the Black Mesa Permit would have "no effect" on endangered or threatened species or their critical habitat and therefore the Region did not engage in consultation with the Services.

The Region identified potentially affected species utilizing a list of endangered and threatened species the FWS completed for the site.[26] A.R. at 34-36 (Black Mesa Fact Sheet 12-14); A.R. at 73 (RTC at 31). Based on an examination of those species listed by the FWS, and

[26] BMWC Petitioners in neither their BMWC Petition nor BMWC Supplemental Brief dispute the scope of the list the Region used to make the "no effect" determination.

all the information received and reviewed, the Region concluded that the discharge of treated wastewater from the site will have no effect on endangered or threatened species or designated critical habitat.[27] A.R. at 36 (Black Mesa Fact Sheet at 14). The Region explained in its Response to Comments that "no threatened or endangered aquatic species are located in the tributaries where discharges of treated wastewater are being permitted. In addition, no threatened or endangered aquatic species are located in the tributaries downstream of the permitted discharges. Additionally, all receiving waters are ephemeral drainages which do not support populations of fish which could be consumed by species of concern such as the bald eagle or California brown pelican. Therefore, there is no potential for indirect impacts which could occur from species consuming fish in the vicinity of the outfalls." A.R. 74 (RTC at 32); *see also* A.R. 36 (Black Mesa Fact Sheet at 14).

The Region went on to explain that "the mines discharge infrequently; with over 100 permitted outfalls located over a 65,000 acre lease area, the facility has discharged only 31 times over the past five years from 2005-2009 for a total volume under 500 acre-ft." A.R. at 74 (RTC at 32); *see also* A.R. 34-36 (Black Mesa Fact Sheet at 12-14). Lastly, the permit requires all discharges to meet water quality standards that have been specifically set at a level necessary to protect aquatic wildlife and "because the discharges are often to dry washes without dilution, EPA has not considered available dilution in its assessment. Therefore, EPA has made the most

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[27] The Region sent a copy of the proposed Black Mesa Permit and Black Mesa Fact Sheet to the FWS for review and comment during the public comment period. A.R. at 74 (RTC at 32). FWS did not object to EPA's analysis or "no effect" determination. *See In re Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, 2009 WL 152741 (EAB 2009) (in upholding the Region's "no effect" determination the Board specifically noted that the Region had sent the draft permit and fact sheet to FWS and received no adverse comments). It is also noteworthy that there is no designated critical habitat for listed species on the site. *See* A.R. at 25-26 (February 12, 2009 Letter of Proposed Permit); A.R. at 85 (Notice of Public Hearings).

conservative and protective assumption of no available dilution in its analysis that water quality standards must be met at the end of pipe prior to discharge." A.R. at 74 (RTC at 32). All drainages are "treated in pond systems to remove sediment accumulated from the mining activities prior to discharge." A.R. at 74 (RTC at 32). Therefore, even if listed species were somehow present, for the above reasons, the discharges would not likely affect listed species. A.R. at 74 (RTC at 32); *see also* A.R. at 36 (Black Mesa Fact Sheet at 14). BMWC Petitioners do not argue that this response is erroneous, or otherwise take issue with it, and the BMWC Petition should thus be denied on this ground.

BMWC Petitioners' petition focuses on EPA's alleged reliance on the BA completed by OSM for a Life of Mine Permit for the site. Their arguments are misplaced, however, since the Region simply used the list of endangered and threatened species completed by the FWS for the site.[28] A.R. at 75 (RTC at 33). There is nothing inappropriate with the Region using a list created by the relevant expert agency that lays out the factual situation on the ground in reference to endangered and threatened species that may be on the site. In fact, ESA regulations allow agencies to utilize other BAs prepared for similar actions. 50 C.F.R. 402.12(g). In any event, as discussed above, the Region made its own independent determination, and did not rely on the OSM BA, in making a "no effect" determination. A.R. at 36 (Black Mesa Fact Sheet at 14); A.R. at 75 (RTC at 33).

Additionally, BMWC Petitioners argue that the Region erred in not considering potential impacts to listed species or habitats that may be caused by actions outside the scope of the Black Mesa permitting action. *See* Supplemental Brief at 25-28. Specifically, BMWC Petitioners want the Region to consider any impacts to listed species due to impacts to riparian habitat from the

[28] The FWS list was completed for OSMRE's Life of Mine Permit action.

discharge of dredged or fill material associated with the creation of impoundments on the site; air emissions from coal-fired power plants (the Region assumes from coal mined from the site) and climate change (the Region assumes caused by greenhouse gases from the extraction and burning of coal that was mined from the site). As discussed in detail in the Region's response to comment document, which was not addressed in BMWC Petitioners' Supplemental Brief, the Region did not consider these impacts since they are either permitted by EPA under other provisions of the CWA or other environmental statutes, or because there is no causal connection between the Black Mesa Permit and the impacts being alleged by BMWC Petitioners. A.R. at 75-76 (RTC at 33-34).

Because BMWC Petitioners have not articulated any reviewable error in the Region's ESA analysis or its conclusion, and because the project would have "no effect" on any federally listed endangered or threatened species or critical habitat, the BMWC Petition should be denied on this ground.

5. Procedural Issues

a. The Region made public all relevant information related to the promulgation of the Black Mesa Permit

BMWC Petitioners argue that the Region failed to make public during the draft permitting stage the monitoring data that formed the basis of the permit application. *See* BMWC Petition at 8-9. The BMWC Petition should be denied on this ground because BMWC Petitioners simply repeat their objections made during the comment period, merely adding that "EPA has yet to make available the full administrative record before the agency and for purposes of appeal." BMWC Petition at 4.

As a threshold matter, BMWC Petitioners have not preserved this issue for review since they have simply repeated, verbatim, their comments on the draft permit and they provide no discussion of why the Region's Response to Comments is clearly so erroneous as to warrant review. *See* A.R. 305-06 (BMWC Comments at 2-3). The Region responded to BMWC Petitioners' concerns related to the adequacy of the record and availability of information to the public and specifically addressed each of the Petitioners' claims that data and documents were not made available during the public comment period. *See* A.R. at 77-79 (RTC at 35-37). In merely repeating their objections made during the comment period, BMWC Petitioners do not demonstrate in the BMWC Petition or the BMWC Supplemental Brief why the Region's response to those objections is clearly erroneous or otherwise warrants review, thus the BMWC Petition should be denied on this ground. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240.

As discussed in its Response to Comments, the Region made all relevant information related to the promulgation of the Black Mesa Permit available to the public during the comment period. A.R. at 77-79 (RTC at 35-37). The draft Black Mesa Permit was based on the administrative record as of January 20, 2010, including all of the required materials listed at 40 C.F.R. 124.9(b). This included the permit application and "any supporting data furnished by the applicant." 40 C.F.R. 124.9(b)(1). The administrative record in this case included all documents, materials, and information upon which the Region relied in making its permitting decision. *See In re: Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490 (EAB 2006); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). EPA did not omit any of the data supplied by the applicant from the administrative record.

BMWC Petitioners make several claims that information upon which the Region relied in issuing the Black Mesa Permit was not made available to the public during the comment period, including: monitoring data, including water chemistry and flow rates; annual seep investigations and management plans; maps of outfall locations; and information related to the permitting process of the Corps under CWA section 404. *See* BMWC Petition at 8-9; BMWC Supplemental Brief at 3-5.

First, it must be noted that the Region has provided BMWC Petitioners with the complete administrative record, as discussed in detail above in Section IV.A.1 and in the Region's Response to Petitioners' Motion for Extension of Time to File Supplemental Brief. Exhibit 1 at 2-5.

In terms of the monitoring data, the information relied upon by the Region on water chemistry and flow rates is provided in the administrative record and in the Black Mesa Fact Sheet at 3-4. A.R. at 25-26; *see also* A.R. 974-1030. For example, in the Black Mesa Fact Sheet the date, volume, and source of *every* discharge which has occurred from 2005-2009 is highlighted. A.R. at 25-26 (Black Mesa Fact Sheet at 3-4). Also, the permit application provides organic, inorganic, biological and radiochemical analysis for pollutant concentrations in discharges from the site, including the maximum daily value and concentration for analytical parameters. A.R. at 974-1030 (NPDES Permit Application, Form 2C, Attachment 1). BMWC Petitioners are correct in that the administrative record does not include a copy of every Discharge Monitoring Report ("DMR") that the permitee has submitted every quarter in accordance with the terms of the 2000 Black Mesa Permit. However, the Region does not typically include every DMR submitted by the permitee as part of the administrative record due to the large volume of materials and the fact that the Region utilizes the data provided in the

permit application, not the DMRs, to assess the reasonable potential of the discharge to cause or contribute to a violation of water quality standards.[29]

In terms of the data on the seep investigations, the information from the seep investigations is provided throughout the administrative record, A.R. 1041-1138, and, notably, in the Black Mesa Fact Sheet at 10-11. A.R. at 32-33. The Interim Final Report on Seep Management Plan, A.R. 1041-1079; the Supplemental Information – Interim Final Report on Seep Management Plan, A.R. at 1080-1131; the Preliminary Draft Proposal for Seep Management Report, A.R. at 1132-1134; and the Black Mesa Complex Seep Management Plan, A.R. 1135-1138, are all included in the administrative record. As far as any seep management reports that were submitted to the Region as part of the permitees' DMRs pursuant to the terms of the 2000 Black Mesa Permit those seep management reports are publicly available, and, as noted above, the Region provided BMWC Petitioners every DMR submitted by the permittee, as well as yearly seep management reports, from August 2, 1996 to April 1, 2008 in response to their March 29, 2010 Freedom of Information Act Request. A.R. at 562-577.

In terms of maps showing the locations of the outfalls, the locations of all 111 outfalls are provided in the Black Mesa Permit, which lists each outfall serial number, with the latitude, longitude, and receiving water of each discharge location. A.R. at 19-22 (Black Mesa Permit 19-22). The use of latitude and longitudinal coordinates is the most accurate method of identifying

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[29] While the DMRs are not included in the Administrative Record, all DMRs are publicly available documents which can be obtained directly from EPA by request or, alternatively, can be directly viewed on EPA's website through the Permit Compliance System webpage. *See* Facility Detail Report for Black Mesa Complex, *available at* http://oaspub.epa.gov/enviro/fii_query_dtl.disp_program_facility?pgm_sys_id_in=NN0022179&pgm_sys_acrnm_in=PCS (last visited Jan. 13, 2011). Additionally the Region provided to BMWC Petitioners every DMR submitted by the permittee from February 4, 2004 to February 15, 2010X in response to their March 29, 2010 Freedom of Information Act Request. A.R. at 562-577.

the location of the outfalls and meeting the data tracking requirements of the NPDES Permit Compliance System. *See* Permit Compliance System Database, *available at* http://www.epa.gov/enviro/html/pcs/pcs_query_java.html (last visited, Jan. 13, 2011). In addition, small-format maps of the site were provided at the public hearings on February 23, 2010 and February 24, 2010, A.R. 180-182, and large-format maps are contained in the permittee's Sediment Control Plan which are included in the administrative record, A.R. at 1296-1299, and large format maps of the entire site are available to the public and were provided to BMWC Petitioners in the Region's March 29, 2010 FOIA response. A.R. at 562-577.

b. The Region held meaningful public hearings on the Black Mesa Permit

BMWC Petitioners argue that the Region failed to hold meaningful public hearings on the Black Mesa Petition. *See* BMWC Petition at 9. The BMWC Petition should be denied on this ground because BMWC Petitioners simply summarize objections they made during the comment period. *See* A.R. at 304-305 (BMWC Comments at 1-2). BMWC Petitioners have not even addressed this issue in their Supplemental Brief and provide no discussion of why the Region's response to their comments is clearly so erroneous as to warrant review. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. Additionally, as discussed in detail in its Response to Comments, *see* A.R. 47-49 (RTC at 5-7), the Region held meaningful public hearings and satisfied all public notice requirements during the permitting process. In failing to discuss this issue whatsoever, let alone address the Region's response to their comments, BMWC Petitioners do not meet the threshold requirements for Board review of this issue and the BMWC Petition should be denied on this ground.

40 C.F.R. 124.12 establishes basic procedural requirements for public hearings, all of which the Region satisfied. A.R. at 123-124 & 127-245. In this case, the Region, on December

3, 2009, withdrew the August 2009 reissuance of the Black Mesa Permit solely in order to hold public hearings on tribal lands to ensure that interested parties were given full opportunity to meaningfully participate in the permit proceedings. A.R. at 872-874; A.R. at 47 (RTC at 5). The Region held two public hearings on tribal lands on February 23, 2010 in Kayenta, AZ and February 24, 2010 in Kykokstmovi, AZ. A.R. at 123-124; A.R. at 47 (RTC at 5). The Region planned workshops and hearings at times and locations that provided reasonable access to members from both the Navajo Nation and Hopi Tribe and members of the public and over 100 people were able to attend the hearings. A.R. at 48 (RTC at 6). The Region followed advice from Navajo EPA and the Hopi Water Resources Department about when and where to hold the public hearings. A.R. at 48 (RTC at 6). Navajo and Hopi language interpreters were available at the public hearings to ensure that non-English speaking people could participate. EPA offered formal government-to-government consultations on the Black Mesa Permit to both the Navajo Nation and Hopi Tribe. A.R. at 48 (RTC at 6). The Region twice extended the comment period in response to requests, the last being to April 30, 2010. A.R. at 48 (RTC at 6). Additionally, while the Region encourages and informs other federal agencies on important matters related to the issuance of NPDES permits, the decision of other agencies to attend public hearings is at the discretion of the other agencies. The Region has met all of its obligations to provide for full and meaningful public participation for the reissuance of the Black Mesa Permit and thus the BMWC Petition should be denied on this ground.

6. CRE Petition

The issues raised by the CRE Petitioners are grouped into three categories which the Region would generally characterize as: (1) the misleading name of the site; (2) NEPA; and (3) concurrent permitting under CWA section 402 and 404.

As a threshold matter, CRE Petitioners have not preserved *any* issues for review before the Board. Petitioners cannot simply repeat their comments made during proposal in their petition; instead, petitioners have the burden to demonstrate *why* the Region's response to those objections is clearly erroneous or otherwise warrants review. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. In their Petition, CRE Petitioners don't even purport to address the Region's responses to their comments at the time of proposal: CRE Petitioners specifically state that their petition contains "[a] summary of the issues in their comments." CRE Petition at 3.[30] While it is difficult for the Region to understand what specific procedural defects or conditions of the Black Mesa Permit CRE Petitioners are actually challenging, the Region, in its response to comment document, *see generally* A.R. at 42-84 (RTC), has provided a detailed response to the comments that were raised for all the issues the Region can ascertain are raised in the CRE Petition and CRE Petitioners in no way address the Region's responses to those comments. Thus the CRE Petition should be denied on this ground. *See generally*, A.R. at 43-84 (RTC).

a. The Black Mesa Permit appropriately identifies the discharges from the Black Mesa and Kayenta Mines which it regulates

CRE Petitioners argue that the "Black Mesa Complex does not exist" and that the permit application should be "re-submitted without using the name 'Black Mesa Complex.'" CRE

[30] Note: the CRE Petition does not include page numbers. In order to reference statements in the CRE Petition the Region will begin page 1 with the page entitled "Introduction."

Petition at 3. The CRE Petition should be denied on this ground because, as stated above, CRE Petitioners simply repeat their objections made during the comment period and provide no discussion of why the Region's response to their comments is clearly so erroneous as to warrant review. A.R. at 46-47 (RTC at 4-5); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. Second, CRE Petitioners provide no explanation why the name of the site has any impact on the permitting of discharges from the site or why permitting the discharges from the Black Mesa and Kayenta mines together is clearly erroneous.[31] Lastly, it is appropriate that the Black Mesa Permit covers discharges from the Black Mesa and Kayenta mines that, together, form the Black Mesa Complex that is the referred throughout this brief as the site.

The Region determined to continue to permit discharges from the site under one NPDES permit for, generally, two reasons. A.R. at 46-47 (RTC at 4-5). First, the Region has historically permitted the site as one facility. A.R. at 1334 (2000 Black Mesa Permit). The site consists of one contiguous property engaged in coal mining operations under the control of one entity, the permitee, Peabody Western Coal Co., with two areas of present and past coal extraction operations. A.R. at 46-47 (RTC 4-5). It is efficient for the Region to permit discharges from both the Black Mesa and Kayenta parts of the site together, through one permitting process, and it allows easier planning for the permitee in terms of necessary actions on site to control discharges from the site pursuant to the terms of the permit. Second, although the permitee no longer engages in active coal mining operations at the Black Mesa portion of the

[31] CRE Petitioners do allege that the name of the site allows Peabody Western Coal Co, to seek a permit for a "non-existent mine plan." CRE Petition at 4. This, however, does not raise an issue concerning the Region's authority to issue a NPDES permit for discharges from point sources at both mines under a single NPDES permit.

site, discharges from that mine are still possible. A.R. at 26 (Black Mesa Fact Sheet at 4). The relevant effluent limitations found at 40 C.F.R. 434 are applicable to discharge from the site "until the performance bond issued to the facility by the appropriate [SMCRA] authority has been released." *See* 40 C.F.R. 434.52(a) and 434.81(c). The permitee must continue to meet the effluent limitations, monitoring requirements and installation of best management practices in accordance with the Black Mesa Permit until reclamation is complete and the bond is released, neither of which has yet occurred. The Region fails to see, and CRE Petitioners fail to point out, how the fact that a portion of the site is no longer being actively used for coal extraction is relevant to the issue of whether discharges from the site should be permitted under one NPDES permit. The obligation of the permitee under the CWA, to control discharges of pollutants to waters of the United States from point sources on the site, does not cease when active mining operations cease, and the permit reflects this obligation.

b. The Black Mesa Permit is not subject to the procedural requirements of NEPA

CRE Petitioners argue that a NEPA analysis should have been conducted for the issuance of the Black Mesa Permit.[32] CRE Petition at 4-7. The CRE Petition should be denied on this ground because, as stated above, CRE Petitioners simply repeat the objections they made during the comment period and provide no discussion of why the Region's response to their comments is clearly so erroneous as to warrant review. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. Additionally, the CRE Petition should be denied on this ground since the CWA at section 511(c)(1) specifically exempts the

[32] CRE Petitioners raise a number of substantive concerns, such as the identification of impoundment seepage, CRE Petition at 5, but they do so in the context of arguing that such concerns be given a "hard look" as part of a NEPA review of the permit issuance. For this reason, the Region does not address these as separate substantive issues and address only the underlying issue of why review under NEPA was not needed for the Black Mesa Permit.

issuance of NPDES permits from the definition of "major federal action significantly affecting the quality of the human environment" within the meaning of NEPA. *See* Section IV.A.2 above for the Region's response to BMWC Petition on this same issue for an explanation of why, pursuant to EPA regulations, the site does not meet the definition of "new source coal mine" and is thus not a "new source" under CWA section 306. Since the site is not a new source the CWA section 511(c)(1) exception to NEPA applies and the Region was not required to comply with the requirements of NEPA before issuing the Black Mesa Permit. Thus, the CRE Petition should be denied on this ground.

c. The Region correctly did not analyze any potential discharges of dredged or fill material covered under CWA section 404 associated with the site in issuing the Black Mesa Permit

CRE Petitioners argue that the Region "should design parameters and any necessary wastewater treatment processes as part of the NPDES permit and section 404 permitting process for mine impounds concurrently." CRE Petition at 7. As a threshold matter, the CRE Petition should be denied on this ground because CRE Petitioners provide no discussion of why the Region's response to their comments on this issue, *see* A.R. at 83 (RTC at 41) ("A separate CWA Section 404 permit, [is] issued by the U.S. Army Corps of Engineers"), is clearly so erroneous as to warrant review. *See In re Steel Dynamics, Inc.*, 9 E.A.D. at 744; *In re City of Marlborough*, NPDES Appeal No. 04-13, at 240. Thus, the CRE Petition should be denied on this ground. Also, as the Region has explained above in Section IV.A.3.e, the discharge of dredged or fill material is permitted under CWA section 404, *not* CWA section 402. *See* CWA section 404(a) ("The [Corps] may issue permits...for the discharge of dredged or fill material into the navigable waters at specified disposal sites."); A.R. at 83 (RTC at 41). Thus, the CRE Petition should be denied on this ground.

Throughout pages 7-19 of the CRE Petition CRE Petitioners, in what appears to be support for their argument that the CWA section 402 and CWA section 404 permitting process should be done concurrently, moves between various and numerous issues. For example, CRE Petitioners in the CRE Petition discuss the Seep Monitoring and Management Plan at 9, monitoring requirements at 12, water rights at 12, regulatory takings claims under the Fifth Amendment of the U.S. Constitution at 13, changes to the NPDES procedural regulations at 14, and civil penalties under the CWA at 19. *See generally* CRE Petition at 7-19. The Region is unable to link the majority of the issues raised in pages 7-19 to CRE Petitioners' argument regarding CWA section 404 permitting. Nevertheless, as far as these issues are going to the argument that the Region should have concurrently engaged in permitting under CWA sections 402 and 404, the Region has made clear above in Section IV.A.3.e and, in its response to comment document, that the Black Mesa Permit renewal does not "address, nor authorize any activity which results in the discharge of dredged or fill material to a water of the U.S," A.R. at 83 (RTC at 41). While the Region agrees with CRE Petitioners, when in their petition they state, "a person must obtain a [404] permit from *the Corps*" (CRE Petition at 18) (emphasis added), any argument related to such discharges of dredged or fill material is outside the scope of the review of the reissuance of the Black Mesa Permit by the Region and the CRE Petition should be denied on this ground.

To the extent CRE Petitioners, in pages 7-19 of the CRE Petition, are raising additional issues for review before the Board, these issues should be denied since Petitioners have not met their burden under 40 C.F.R. 124.19, requiring that the petitioner explain what condition is being challenged and why the challenged condition(s) merit review. *See e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 (EAB 2002). In doing so, the petitioner must not only

identify the disputed issues but demonstrate the specific reasons why review is appropriate. *See In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992).

In terms of substance, for all of the issues the Region is able to identify as having the *potential* to be separate challenges of the Black Mesa Permit, such as CRE Petitioners' statements on the Seep Monitoring and Management Plan at 9,[33] monitoring requirements at 12,[34] water rights at 12,[35] regulatory takings claims under the Fifth Amendment of the U.S.

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[33] As stated above, the Black Mesa Permit does *not* authorize the discharge of pollutants via the seeps and the seeps are not included in the 111 outfalls that are authorized under the permit. A.R. at 30 (Black Mesa Fact Sheet at 8); A.R. at 58-59 (RTC at 16-17). As stated in the Black Mesa Fact Sheet "[a] seep is an area *not* related to the [permitted] outfall location" (emphasis added) A.R. at 30 (Black Mesa Fact Sheet at 8). Many of the seeps "do not exhibit measurable volumes of flow" and the seeps typically "will disappear back into the soils within a short distance" of the impoundment. A.R. at 30 (Black Mesa Fact Sheet at 8). The purpose of the Seep Monitoring and Management Plan in the Black Mesa Permit is to identify and characterize seeps, identify any seeps that might pose a threat to water quality should they reach of water of the United States, and establish practices to control and eliminate the seeps. A.R. at 8-9 (Black Mesa Permit at 8-9). The Region does not see how a waste-treatment process would be appropriate in this case given the seeps are not permitted discharges under the permit and the permitee is already working to eliminate all seeps that might pose a threat to water quality under the Seep Monitoring and Management Plan. Additionally, as the Region stated in its response to comment document the Region's authority to "commence an enforcement action, including issuance of an administrative compliance order…is not linked to the issuance of a permit pursuant to Section 402 of the CWA, and furthermore, EPA is afforded discretion in the exercise of its enforcement authority." A.R. at 60 (RTC at 18).

[34] The Permitee, not the Region, is responsible for day to day monitoring of any discharges from the site and reporting those monitoring results to the Region, the Navajo Nation and Hopi Tribe. *See* A.R. at 13-16 (Black Mesa Permit at 13-16); A.R. at 34 (Black Mesa Fact Sheet at 12); *see also* 40 C.F.R. 122.44(i); 40 C.F.R. 122.48.

[35] As stated in the Region's Response to Comments, *see* A.R. at 83-84 (RTC at 41-42), the effects of the work on the site, in terms of impoundment removal and implementation of the Sediment Control Plan for purposes of protecting downstream water quality, may have beneficial impacts on water quantity.

Constitution at 13,[36] changes to the NPDES procedural regulations at 14,[37] and civil penalties under the CWA at 19,[38] there is no supporting discussion or explanation of these issues sufficient to present valid arguments to which the Region can adequately respond; thus, the CRE Petition should be denied on these grounds.

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[36] The Board does not have jurisdiction to hear individual takings claims under the Fifth Amendment of the U.S. Constitution. *See In re Miners Advocacy Council*, 4 E.A.D. 40 (EAB 1992) ("Any individual takings claim must be brought in the U.S. Court of Claims or the United States District Court. Section 124.91, (sic) governing NPDES permit Appeals, does not authorize the Environmental Appeals Board to entertain individual takings claims."); *see also* 40 C.F.R. 124.19; *Rybachek v. EPA*, 904 F.2d 1276, 1300-01 (9th Cir. 1990).

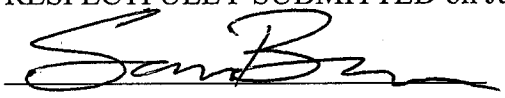
[37] If CRE Petitioners are in any way challenging EPA regulations through this permitting process, the Board has stated that it will not entertain challenges to final Agency regulations in the context of permit appeals. *See In re USGen New Eng., Inc.*, 11 E.A.D. at 555; *In re City of Irving*, 10 E.A.D. at 123-25.

[38] This is an NPDES permitting action, not an enforcement action for unauthorized discharges or violation(s) of an NPDES permit, thus CRE Petitioners' discussion regarding violations of the CWA and penalties under CWA section 309 is completely irrelevant.

V. Conclusion

For all the reasons stated above, the Board should deny the petitions for review. Petitioners have not satisfied the requirements of 40 C.F.R. 124.19 for obtaining review on most of the issues raised, and the Petitioners have not demonstrated that the Region has failed to comply with any procedural or substantive requirements of the CWA, NEPA and ESA.

RESPECTFULLY SUBMITTED on January 14, 2011



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 14, 2011 he caused a copy of the foregoing to be served by Central Data Exchange and overnight express mail on:

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